DOCKET

No. 08-304

Title: Graham County Soil and Water Conservation District, et al., Petitioners
v.
United States, ex rel. Karen T. Wilson

Docketed: September 8, 2008

Lower Ct: United States Court of Appeals for the Fourth Circuit

Case Nos.: (07-1322)

Decision Date: June 9, 2008

Questions Presented

Date	Proceedings and Orders
Sep 5 2008	Petition for a writ of certiorari filed. (Response due October 8, 2008)
Sep 10 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the petitioners.
Oct 8 2008	Brief amicus curiae of National League of Cities filed.
Oct 8 2008	Brief amici curiae of Pharmaceutical Research and Manufacturers of America, et al. filed.
Oct 8 2008	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Oct 8 2008	Brief amici curiae of Washington Legal Foundation, et al. filed.
Oct 8 2008	Brief amici curiae of Pennsylvania, et al. filed.
Oct 9 2008	Order extending time to file response to petition to and including November 7, 2008.
Nov 7 2008	Brief of respondent United States, ex rel. Karen T. Wilson in opposition filed.
Nov 18 2008	Reply of petitioners Graham County Soil and Water Conservation District, et al. filed.
Nov 19 2008	DISTRIBUTED for Conference of December 5, 2008.
Dec 8 2008	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 20 2009	Brief amicus curiae of United States filed.
Jun 2 2009	DISTRIBUTED for Conference of June 18, 2009.
Jun 9 2009	Letter from counsel for the petitioners received. (Distributed).
Jun 22 2009	Petition GRANTED.
Jul 13 2009	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including August 27, 2009.
Aug 27 2009	Joint appendix filed. (Statement of costs filed)
Aug 27 2009	Brief of petitioners Graham County Soil and Water Conservation District, et al. filed.
Sep 3 2009	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Sep 3 2009	Brief amici curiae of Washington Legal Foundation, et al. filed.
Sep 3 2009	Brief amici curiae of National League of Cities, et al. filed.
Sep 3 2009	Brief amici curiae of Pennsylvania, et al. filed.
Sep 10 2009	The time within which to file the respondent's brief on the merits is extended to and including October 19, 2009.
Sep 28 2009	SET FOR ARGUMENT ON Monday, November 30, 2009.
Oct 2 2009	CIRCULATED.
Oct 15 2009	Record received from U.S.C.A. for the 4th Circuit. (1 box)
Oct 19 2009	Brief of respondent Karen T. Wilson filed. (Distributed)

Oct 26 2009	Brief amicus curiae of American Center for Law and Justice filed. (Distributed)
Oct 26 2009	Brief amicus curiae of United States filed. (Distributed)
Oct 26 2009	Brief amicus curiae of Taxpayers Against Fraud Education Fund filed. (Distributed)
Oct 26 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 5 2009	Record for the U.S.D.C. for the Western District is electronic.
Nov 9 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 17 2009	Reply of petitioners Graham County Soil and Water Conservation District, et al. filed. (Distributed)
Nov 30 2009	Argued. For petitioners: Christopher G. Browning, Jr., Solicitor General, Raleigh, N.C. For respondent: Mark T. Hurt, Abingdon, Va.; and Douglas Hallward-Driemeier, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)
Dec 1 2009	Letter, dated December 1, 2009, received from the Solicitor General. (Distributed).
Dec 3 2009	Letter, dated December 3, 2009, received from counsel for petitioners. (Distributed).

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

08-304 SEP 5 - 2008

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No. _____

In the
Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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September 2008

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QUESTION PRESENTED

Whether an audit and investigation performed by a State or its political subdivision constitutes an "administrative . . . report . . . audit, or investigation" within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioners are Graham County Soil & Water Conservation District, Gerald Phillips, Allen Dehart, Lloyd Millsaps, Cherokee County Soil & Water Conservation District, Bill Tipton, C.B. Newton, Eddie Wood, Graham County, Raymond Williams, Dale Wiggins, Lynn Cody and Keith Orr.

Richard Greene, Billy Brown and William Timpson were parties to the proceedings below but did not join in the petition.

The respondent is the United States of America ex rel. Karen T. Wilson.

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The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-46a) is reported at *United States ex rel. Wilson v. Graham County Soil & Water Conservation District*, 528 F.3d 292 (4th Cir. 2008). The opinion of the district court (Pet. App. 47a-152a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 9, 2008. (Pet. App. 1a) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the jurisdictional bar of the False Claims Act. 31 U.S.C. § 3730(e)(4) (2000). This section provides:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the

> action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4). The False Claims Act is set out in Petitioners' Appendix at 153a - 188a.

STATEMENT

1. The False Claims Act establishes civil penalties in connection with the presentment of a false or fraudulent claim for payment by the United States. 31 U.S.C. § 3729(a)(1) (2000). An action to recover statutory damages and civil penalties may be brought by the Attorney General or by a private person ("relator" or "*qui tam* plaintiff") in the name of the United States. 31 U.S.C. § 3730(a), (b) (2000). When a relator brings such an action, the United States may intervene and pursue the prosecution of the claim or

decline to participate in the proceeding. 31 U.S.C. § 3730(b)(2) (2000). Regardless of whether the United States chooses to intervene, the relator stands to recover a monetary reward (ranging from 10 to 30% of the recovery, plus attorneys' fees) for filing the action. 31 U.S.C. § 3730(d) (2000).

Congress included a public disclosure bar in the False Claims Act to preclude opportunistic plaintiffs from filing *qui tam* actions based on the work of others. 31 U.S.C. § 3730(e)(4)(A) (2000). Under the public disclosure bar, a private person generally cannot bring a *qui tam* action based on the following public information: "allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." *Id.* (Pet. App. 163a). If, however, the plaintiff is the original source of the information, the public disclosure bar does not preclude the action from being brought. *Id.*

2. On January 25, 2001, Plaintiff Karen T. Wilson filed a *qui tam* action and retaliatory discharge claim against Graham County Soil & Water Conservation District, Graham County, Cherokee County Soil & Water Conservation District and various individuals.[1] *See* 31 U.S.C. § 3730(b) (2000)

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[1] This Court addressed the statute of limitations applicable to Wilson's retaliatory discharge action in *Graham County Soil & Water Conservation District v.*

(*qui tam* provisions); 31 U.S.C. § 3730(h) (2000) (retaliatory discharge provisions). The jurisdiction of the district court was based on 31 U.S.C. § 3732(a) and 28 U.S.C. § 1331. The United States declined to intervene in the action.

In February 1995, a storm struck portions of western North Carolina, causing flooding and erosion. Following this storm, both Cherokee County and Graham County applied for federal assistance under the Emergency Watershed Protection Program. *See* 16 U.S.C. § 2203 (2006); 7 C.F.R. §§ 624.1 to .11 (2008). Pursuant to the terms of this federal program, both Cherokee County and Graham County entered into project agreements with the United States Department of Agriculture ("USDA"). Under those agreements, the counties agreed to pay 25% of cleanup costs and the USDA agreed to pay the remaining 75%. In each county, the work performed under the Emergency Watershed Protection Program was coordinated by the soil and water conservation districts.

In her complaint and deposition, plaintiff asserted that the payments made pursuant to this program were false and fraudulent for the following reasons: (1)

United States ex rel. Wilson, 545 U.S. 409 (2005). Following remand from this Court, the Fourth Circuit dismissed Wilson's retaliatory discharge action as time barred. *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 424 F.3d 437 (4th Cir. 2005).

any work under this federal program was required to be sent out for bids, which was not done, (2) one of the individual defendants had a conflict of interest in performing work for Graham County, (3) certain work performed by one of the individual defendants was sub-standard and did not comply with the requirements for the project, and (4) one of the individual defendants (Richard Greene) stole logs during the storm cleanup.

Over four years prior to the filing of the complaint, two of these items (failure to obtain bids for the work and the potential conflict of interest) were detailed in an audit report submitted to Graham County. That audit constitutes a public record under North Carolina law and was readily accessible to the general public. N.C. Gen. Stat. § 132-1 to -10 (2007). In addition to the March 1996 audit, a May 1996 report prepared by the North Carolina Department of Environment and Natural Resources also addresses various items that were later made the subject of plaintiff's complaint. Like the county audit, this document constitutes a public record under state law. *Id.*

3. On March 13, 2007, the district court held that plaintiff's claims are jurisdictionally barred pursuant to 31 U.S.C. § 3730(e)(4)(A). The district court held, in the alternative, that defendants are entitled to summary judgment with respect to the merits of plaintiff's claims.

In its decision, the district court concluded that a state audit or investigation is sufficient to constitute a

public disclosure under 31 U.S.C. § 3730(e)(4)(A). (Pet. App. 95a-97a) The district court further found that Wilson had based her complaint on such a document and that she was not an original source of the information. (Pet. App. 95a-98a)

On June 9, 2008, the Fourth Circuit reversed the district court's entry of judgment in favor of defendants. The Fourth Circuit concluded that a state audit, investigation or report does not constitute a public disclosure under 31 U.S.C. § 3730(e)(4)(A). The Fourth Circuit remanded the action to the district court for determination as to whether any portion of plaintiff's complaint had been based on a federal administrative report prepared by USDA and, if necessary, further consideration of whether defendants were entitled to summary judgment on the merits.[2]

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[2] Karen Wilson denies having had access to this USDA report. *See United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1349 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994) (unless plaintiff actually derived the allegations of her complaint from a public disclosure, plaintiff's complaint is not barred by 31 U.S.C. § 3730(e)(4)(A)). Moreover, the USDA report does not address whether the work done under this federal program was required to be sent out for bids. (4th Cir. J.A. 1473-552) Thus, even though the Fourth Circuit remanded the action and directed the district court to give further consideration to the USDA report, the principal claim against Graham County Soil and Water Conservation District, Graham County and Cherokee County Soil and Water Conservation District is not barred

In its opinion, the Fourth Circuit expressly recognized that the issue of whether 31 U.S.C. § 3730(e)(4)(A) is limited to federal administrative audits and reports or also includes state administrative reports "has divided the circuit courts." 528 F.3d at 296 (Pet. App. 5a-6a); *see also id.* at 301 (Pet. App. 21a) (noting that circuits that have considered this issue "have come to different conclusions"). In reaching its conclusion, the Fourth Circuit rejected opinions of the Eighth, Ninth and Eleventh Circuits on this issue and adopted the rationale of the Third Circuit. 528 F.3d at 301-07 (Pet. App. 21a-37a).

The Fourth Circuit expressly recognized that the literal language of the statute, 31 U.S.C. § 3730(e)(4)(A), includes state administrative audits and reports. 528 F.3d at 301 (Pet. App. 22a). Nevertheless, the Fourth Circuit concluded that congressional intent justified overriding the literal language of the False Claims Act. *Id.* (concluding that "examination of the relevant language in context" overrides Congress' literal language). The opinion of the Fourth Circuit concedes, however, that the meaning of the statute is "murky" and could only be definitively resolved with a "secret decoder ring." *Id.* at 305 (Pet. App. 32a).

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by the USDA report and must proceed on the merits.

REASONS FOR GRANTING THE PETITION

This petition provides the Court with an opportunity to resolve a split among the circuits as to whether an administrative report prepared by a State falls within the scope of the public disclosure bar of the False Claims Act, 31 U.S.C. § 3730(e)(4). Because of the prevalence of *qui tam* actions brought under the False Claims Act, the issue of whether the public disclosure bar is limited to federal administrative reports or also includes state administrative reports has arisen with great frequency. Resolution of this issue is important to the United States, state and local governments, government contractors and *qui tam* plaintiffs.

This Court should grant certiorari to ensure uniformity on this important and recurring question and to reverse the Fourth Circuit's manifestly erroneous ruling.

I. THE FOURTH CIRCUIT'S DECISION DEEPENS AN EXISTING CONFLICT AMONG THE CIRCUITS.

The circuit courts are split on the issue of whether a report, audit or investigation conducted by a State (or its political subdivisions) will give rise to a public disclosure under 31 U.S.C. § 3730(e)(4). On the one hand, the Third Circuit (and now the Fourth Circuit)

has construed the public disclosure bar as limited to federal administrative reports. *United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 745 (3d Cir. 1997); *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292 (4th Cir. 2008). The Sixth Circuit, in dicta, has also expressed support for this construction of the Act. *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717, 725 (6th Cir. 1999). On the other hand, the Eighth, Ninth and Eleventh Circuits have expressly held that the public disclosure bar is not limited to federal administrative reports but also includes reports prepared by state governments. *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917-18 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 1119 (2008); *Battle v. Bd. of Regents*, 468 F.3d 755, 762 (11th Cir. 2006); *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir.), *cert. denied*, 540 U.S. 877 (2003). Additionally, the Fifth Circuit appears to have recently embraced this result. *United States ex rel. Fried v. W. Indep. Sch. Dist.*, 527 F.3d 439 (5th Cir. 2008).

In *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3d Cir. 1997), the Third Circuit attempted to discern whether Congress intended the phrase "a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation" to include audits conducted by a State. Applying the doctrine of *noscitur a sociis*, the Third Circuit construed the word "administrative" by looking to the words immediately before and after it –

"congressional" and "Government Accounting Office." *Id.* The Third Circuit concluded that "'administrative' when read with the word 'report' refers only to those administrative reports that originate with the federal government." *Id.* The Third Circuit also concluded that a broad reading of the disclosure bar would be contrary to congressional intent in that Congress wanted to encourage whistleblowers to come forward. *Id.* at 745-46.

The Fourth Circuit in the present case noted that "the statute by its express terms does not limit its reach to federal administrative reports or investigations." *Graham County*, 528 F.3d at 301 (Pet. App. 22a). Nevertheless, the Fourth Circuit, following the lead of the Third Circuit, relied on the interpretive principle of *noscitur a sociis* to parse the statute, concluding that the placement of "administrative" between other federal sources suggested that "administrative" should be applied only to federal sources. *Id.* at 302-03 (Pet. App. 23a-26a). In doing so, the Fourth Circuit recognized that the issue was a close one that had divided the circuits: "Although we ultimately disagree with [defendants'] approach to the statute, we must admit that there is some force to the argument." 528 F.3d at 303 (Pet. App. 28a); *see also id.* at 296 (Pet. App. 5a-6a) (recognizing that the issue "has divided the circuit courts"). The Fourth Circuit acknowledged that discerning congressional intent was difficult given the ambiguities that plague the False Claims Act. *Id.* at 305 (Pet. App. 32a). Moreover, the

Fourth Circuit recognized that the doctrine of *noscitur a sociis* was not "the strongest of interpretative principles." *Id.* As if pleading for guidance from Congress or this Court, the Fourth Circuit observed that regrettably no one holds a "secret decoder ring with which to gain insight into the meaning of this murky statute." *Id.*

In addition to the Third and Fourth Circuits, the Sixth Circuit has embraced the view that 31 U.S.C. § 3730(e)(4) is limited to federal administrative reports and audits. *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717 (6th Cir. 1999). Citing the *Dunleavy* decision with approval, the Sixth Circuit stated in dicta that the phrase "administrative . . . report" in 31 U.S.C. § 3730(e)(4) "likely" means "reports issuing from federal government agencies." 186 F.3d at 725; *see also United States v. Solinger*, 457 F. Supp. 2d 743, 752 n.7 (W.D. Ky. 2006) (noting that "some courts have interpreted the word 'administrative' in § 3730(e)(4)(A) to refer only to reports produced by federal sources").

In contrast to the Third, Fourth and Sixth Circuits, the Ninth Circuit has held that a state audit or report will give rise to a public disclosure. *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917-18 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 1119 (2008). In *Bly-Magee*, the Ninth Circuit expressly rejected the rationale of the *Dunleavy* decision and held that an audit prepared by the California State Auditor constitutes a public disclosure. The Ninth Circuit concluded that the language of 31 U.S.C. § 3730(e)(4)

does not compel a conclusion that Congress intended the phrase "administrative report or audit" to mean only "federal administrative" reports – "a phrase that Congress could have used but did not." 470 F.3d at 918. Because the language chosen by Congress could be applied without producing an absurd result, the Ninth Circuit saw no reason to resort to principles of statutory interpretation to alter the literal words of the statute. *Id.* The Ninth Circuit concluded that both the text of the False Claims Act and the goals of the jurisdictional bar compel the conclusion that a state audit report may constitute a public disclosure under the Act. *Id.* at 918-19.

The Eleventh Circuit has similarly concluded that a state audit can give rise to a public disclosure within the meaning of 31 U.S.C. § 3730(e)(4). *Battle v. Bd. of Regents*, 468 F.3d 755, 762 (11th Cir. 2006). In *Battle*, plaintiff, a financial aid counselor at Fort Valley State University, informed her supervisor that she believed that federal funds had been fraudulently mishandled by the University's Work Study Program. *Id.* at 757-58. Thereafter, the Georgia Department of Audits conducted an audit of the University that "revealed serious noncompliance with federal regulations." *Id.* at 759. The Eleventh Circuit concluded that because plaintiff's claims "rely chiefly on information that was publicly disclosed in the . . . state audits, the claims are barred unless Plaintiff qualifies as an original source." *Id.* at 762.

In *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir.), *cert. denied*, 540 U.S. 877 (2003), the Eighth Circuit held that an audit conducted by the Minnesota Department of Human Services constitutes a public disclosure. 325 F.3d at 988. In so holding, the court rejected the plaintiff's argument that "because the second use of the word 'administrative' in § 3730(e)(4)(A) is surrounded by 'congressional' and 'Government Accounting Office,' Congress must have meant to include only reports, audits, and investigations of federal government agencies." *Id.* The Eighth Circuit noted that the audit at issue was performed pursuant to a program (Medicaid) in which the state and federal government share the cost of the program and that the audit was conducted by the state in connection with the detailed rules and regulations governing that federal/state program. 325 F.3d at 989. Accordingly, the Eighth Circuit concluded that the state audit at issue "clearly qualif[ies]" as a public disclosure under 31 U.S.C. § 3730(e)(4). 325 F.3d at 989.

The Fifth Circuit has recently signaled that it will likely weigh-in with the Eighth, Ninth and Eleventh Circuits on this split. In *United States ex rel. Fried v. West Independent. School District*, 527 F.3d 439 (5th Cir. 2008), the Fifth Circuit held that because the plaintiff had relied on congressional hearings and GAO reports in preparing the complaint, the plaintiff's *qui tam* suit was barred by 31 U.S.C. § 3730(e)(4). In its opinion, the Fifth Circuit also noted that "a large

section of the evidentiary basis of Fried's claims is the information received pursuant to the Texas Public Information Act (the Texas equivalent to the federal Freedom of Information Act). This court has explicitly stated that response to a public records request constitutes a 'public disclosure' under the FCA." 527 F.3d at 442. Thus, the Fifth Circuit has strongly indicated, if not definitively held, that it will treat documents and reports prepared by a State the same as federal administrative documents for purposes of the public disclosure bar.

Not only has this issue divided the circuits, district courts are split within the remaining circuits that have not resolved the issue. In the Tenth Circuit, for example, district court cases have adopted completely opposite interpretations of the statute. In *In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117 (D. Wyo. 2006), the district court concluded that limiting the word "administrative" to federal administrative reports, audits and investigations is "inconsistent with the plain language of [the statute]." *Id.* at 1143. The district court noted that construing the statute otherwise would lead to "the anomalous result of allowing public disclosure status to the most obscure local news report . . ., but denying public disclosure status to a formal public report of a state government agency." *Id.* at 1144; *see also United States ex rel. Eaton v. Kan. Healthcare Investors, L.P.*, 22 F. Supp. 2d 1230, 1235 (D. Kan. 1998) (indicating that investigation by the Kansas Department of

Health and Environment could give rise to a public disclosure). In *United States ex rel. Fine v. MK-Ferguson Co.*, 861 F. Supp. 1544 (D.N.M. 1994), *aff'd on other grounds*, 99 F.3d 1538 (10th Cir. 1996), the district court reached the opposite result and held that an audit report prepared by the State of Oregon cannot "form the basis for invocation of the section 3730(e)(4)(A) jurisdictional bar." *Id.* at 1550.

District courts in the Second Circuit are equally fractured. In *United States ex rel. Phipps v. Comprehensive Community Development Corporation*, 152 F. Supp. 2d 443, 453-54 (S.D.N.Y. 2001), the court concluded that an administrative investigation conducted by the New York Department of Health would constitute a public disclosure under 31 U.S.C. § 3730(e)(4). In *United States ex rel. Anti-Discrimination Center. v. Westchester County*, 495 F. Supp. 2d 375, 381-83 (S.D.N.Y. 2007), however, a different district court judge in the same district concluded that state and local reports prepared as part of an administrative investigation do not give rise to a public disclosure.

Given the current split among the courts, commentators have appropriately noted that this issue will continue to divide the circuits until resolved by this Court. *See, e.g.*, John T. Boese, Civil False Claims and Qui Tam Actions § 4.02[B], at 4-59 (3d ed. 2006) (31 U.S.C. § 3730(e)(4) "remains an area of sharp dispute between the circuits that must be resolved by the Supreme Court"); *id.* § 4.02[B][2][b], at 4-75 to -76

(Supp. 2007) (detailing split of authority as to whether a state audit or investigation should give rise to a public disclosure); Theodore K. Stream & Jamie E. Wrage, *Preserving the False Claims Act*, 45 Federal Lawyer 56, 59 (June 1998). This is particularly true given that, with the Fourth Circuit's decision, the Third Circuit no longer stands alone among the circuits with respect to its interpretation of 31 U.S.C. § 3730(e)(4).

The Fourth Circuit's decision deepens an existing split between the circuit courts. Review is warranted to resolve this conflict.

II. THE DECISION OF THE FOURTH CIRCUIT RAISES AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW.

The issue of whether the public disclosure bar encompasses state audits and investigations (rather than being limited to federal investigations) is an important and recurring issue of federal law. As the United States has emphasized, this specific issue is of "fundamental interest to [the] United States." Br. for U.S. at 37, *Hays v. Hoffman*, 325 F.3d 982 (8th Cir.) (filed May 6, 2002); *see also* Br. for U.S. as *Amicus Curiae* at 18, *United States ex rel. Bly-Magee*, 128 S. Ct. 1119 (No. 06-1269) (filed Dec. 21, 2007) (noting circuit conflict on the issue of whether a state audit or investigation can give rise to a jurisdictional bar under 31 U.S.C. § 3730(e)(4)). The United States recoups

billions of dollars each year as a result of the False Claims Act. The proper and consistent application of this statute therefore affects the public fisc.

The resolution of this issue also significantly impacts state and local governments. Under the Fourth Circuit's decision, a plaintiff who has no independent knowledge of a false claim could, pursuant to a FOIA request, obtain a copy of an ongoing state investigation and proceed to file a *qui tam* action with respect to any misappropriation of funds of the United States identified in the report. Such a parasitic claim is the very type of action that the public disclosure bar was intended to cut off. More importantly, if the work product of state agencies can be used by creative plaintiffs to obtain a windfall, States run the risk of being deluged by FOIA requests as counsel race to be the first to file a *qui tam* action based on the State's investigative efforts. *See* 31 U.S.C. § 3730(b)(5) (2000) (under the first-to-file provision, the filing of a *qui tam* action by one plaintiff bars all subsequently filed *qui tam* actions brought by other private plaintiffs). Such information requests run a substantial risk of disrupting on-going investigations.

The Fourth Circuit's decision also poses substantial problems when a State investigates one of its political subdivisions. Under the Fourth Circuit's decision, state and local officials may now have reservations about conducting an investigation of a political subdivision of the State – knowing that such

an investigation could subject it to a *qui tam* plaintiff coming in and seeking treble damages and attorneys' fees. The False Claims Act should not be construed in such a way as to result in a chilling effect on state administrative audits and investigations.

The issue raised in the petition is also of great importance to *qui tam* plaintiffs. As *qui tam* plaintiffs have previously argued to this Court, "[u]ncertainty regarding the scope of the public disclosure bar will deter relators and their counsel" from pursuing false claims on behalf of the United States. Petition for Writ of Certiorari, *United States ex rel. Bly-Magee*, 128 S. Ct. 1119 (No. 06-1269) (filed Mar. 16, 2007). Currently, a plaintiff who relies on a state report in pursuing a false claims action against a particular industry faces dramatically different outcomes depending on whether the action is filed in Augusta, Georgia versus a few miles away in Columbia, South Carolina. The district court's decision in *In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117 (D. Wyo. 2005), emphasizes the magnitude of this problem. In that case, the plaintiff filed 73 different actions against approximately 300 gas pipeline companies. These 73 cases were ultimately consolidated for multidistrict litigation. Had the cases not been consolidated for pretrial proceedings, the actions filed in the Fifth, Eighth, Ninth and Eleventh Circuits would likely have been dismissed, those in the Third, Fourth and Sixth Circuits would likely survive, and those in the remaining circuits would face an

uncertain outcome. Neither the government, plaintiffs nor defendants are served by such inconsistency in the application of the False Claims Act.

Last term, this Court invited the views of the Solicitor General when this exact issue was before the Court on a petition for writ of certiorari from the Ninth Circuit. *United States ex rel. Bly-Magee v. Premo*, No. 06-1269 (order of May 29, 2007 inviting views of the Solicitor General); *see* 128 S. Ct. 1119 (2008) (denying certiorari). In response to this invitation, the United States recognized the split among the circuits. Br. for U.S. as *Amicus Curiae* at 18, *United States ex rel. Bly-Magee*, 128 S. Ct. 1119 (No. 06-1269) (filed Dec. 21, 2007). The United States, however, advocated that certiorari should not be granted in that case for two reasons. *Id.* First, the United States noted that the Third Circuit was the only circuit to hold that a state administrative audit will not give rise to a public disclosure. *Id.* The United States therefore urged the Court "to await further development of the issue in the lower courts" before granting certiorari. *Id.* Second, the United States noted that Bly-Magee had filed a series of three successive lawsuits arising from the same allegations and that her most recent complaint would likely "be dismissed as insufficiently particularized even if this Court holds that they are not barred by Section 3730(e)(4)." *Id.* at 19. Neither of these two concerns are applicable here.

At the time of the petition for writ of certiorari in *Bly-Magee*, the Third Circuit stood alone in its reading

of Section 3730(e)(4). Because the Fourth Circuit has joined the Third Circuit on this issue, the split among the circuits has become entrenched. The Fourth Circuit's decision ensures that the conflict among the circuits will remain even if the Third Circuit were one day to reconsider and overrule its decision in *Dunleavy*. Consistency among the circuits can only be achieved if this Court grants review of this issue to resolve a circuit split that is now well developed.

Additionally, the fact that petitioners in the present case might eventually prevail on the merits should not weigh against granting the petition. This Court has recognized that the public disclosure bar is jurisdictional. *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1401 (2007). Accordingly, petitioners should not be required to defend on the merits if there is no claim that can properly be heard by the courts.[3] *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007).

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[3] Given the procedural posture of *Bly-Magee*, it was appropriate for this Court to consider the fact that the plaintiff/petitioner was likely to lose on the merits, thereby making review futile. Because the Ninth Circuit held that Bly-Magee's claims were jurisdictionally barred, the defendants were not required to respond on the merits. In contrast, the Fourth Circuit's decision requires petitioners to defend on the merits – a task they should not be subjected to if the Fourth Circuit is wrong and Wilson's claim is jurisdictionally barred.

Here, the district court, after concluding that plaintiff's claims were jurisdictionally barred, held in the alternative that summary judgment should be granted to defendants as a result of plaintiff's failure to come forward with admissible evidence as to the existence of a false claim. The Fourth Circuit, however, concluded that the district court erred in rendering such an alternative ruling on the merits. The Fourth Circuit remanded with instructions that the district court is to consider whether any portion of plaintiff's claims is jurisdictional barred as a result of a report issued by the USDA.[4] The Fourth Circuit directed that the district court should then proceed to consider the merits of any claims not so barred. In doing so, the Fourth Circuit noted that "nothing in our mandate should be read to preclude the district court from considering the merits of the *qui tam* claims anew." 528 F.3d at 310 (Pet. App. 46a). Thus, the district court's decision on the merits has been expressly vacated by the Fourth Circuit with a directive that this decision may be considered "anew." *Id.* The Court's resolution of the issue raised in the

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[4] As previously noted, the USDA report does not address plaintiff's principal claim against the soil and water conservation districts (i.e., whether the work at issue was required to be sent out for bids). Accordingly, that portion of plaintiff's complaint must go forward on the merits unless the decision of the Fourth Circuit is reversed by this Court.

petition has a direct and immediate impact on the claims in this action.

Unlike *Bly-Magee*, the present petition presents a good vehicle for resolving the circuit split on this important issue.

III. THE FOURTH CIRCUIT ERRED IN CONCLUDING THAT A STATE AUDIT DOES NOT CONSTITUTE AN "ADMINISTRATIVE . . . REPORT . . . AUDIT, OR INVESTIGATION" AS THAT PHRASE IS USED IN THE FALSE CLAIMS ACT.

Not only is there an entrenched circuit split on an issue of fundamental importance to the United States, this Court should grant certiorari because the decision of the Fourth Circuit is manifestly in error. The plain language of the statute directs that federal courts are without subject matter jurisdiction to hear a *qui tam* action that is based on an "administrative . . . report . . . audit, or investigation." 31 U.S.C. § 3730(e)(4). In its decision, the Fourth Circuit recognized that, under the literal language of the statute, the state audit at issue would constitute a public disclosure. 528 F.3d at 301 (Pet. App. 22a). The Fourth Circuit, however, read additional words into the statute. The decision below is therefore directly contrary to prior opinions of this Court.

When statutory language is plain, the sole function of courts, in the absence of a scrivener's error or text that would produce an absurd result, is to enforce the statute according to its terms. *See, e.g., Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 296 (2006). A federal court judge is not at liberty to rewrite a statute to reflect a meaning that he or she deems more desirable. *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 841 (2008). Rather, courts must "give effect to the text Congress enacted." *Id.*

Here, the text of the statute is plain. Congress has used the phrase "administrative" audit, report or investigation rather than employing the phrase "federal administrative audit." Giving effect to the statute as written would not produce an absurd result. Rather, the text chosen by Congress reflects a public policy choice – to place the work product of state government (consistent with principles of federalism) on the same par as a federal investigation. It also reflects a policy choice not to treat state audits and investigations as inferior to local news reports. *See* 31 U.S.C. § 3730(e)(4)(A) (public disclosure may be based on information in report by news media).

The Fourth Circuit justified rewriting this provision of the False Claims Act by relying on the doctrine of *noscitur a sociis*. 528 F.3d at 305 (Pet. App. 32a). The doctrine of *noscitur a sociis*, however, is of "no help absent some sort of gathering with a common feature to extrapolate." *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1849 (2006). Here, 31

U.S.C. § 3730(e)(4) includes a disparate listing (ranging from "criminal hearings" to a "Government Accounting Office report" to "news media") from which no common feature can be extrapolated. Moreover, such a rule of statutory construction should not be employed when Congress has not given careful consideration to either its word choice or the order of the listing. Congress' inattention to detail is reflected by the fact that this section uses the phrase "Government Accounting Office" when it clearly intended "General Accounting Office."[5]

By inserting the word "federal" into the public disclosure bar, the Fourth Circuit has rewritten the False Claims Act in such a way as to produce highly anomalous results – results that Congress clearly did not intend.

First, Congress has expressly provided that information "from the news media" will give rise to a public disclosure. 31 U.S.C. § 3730(e)(4)(A). Under the Fourth Circuit's decision, a one paragraph newspaper report in an obscure weekly paper of

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[5] The Fourth Circuit glosses over this problem by simply noting that years after Congress adopted this provision, the name of the General Accounting Office was changed to the Government Accountability Office. 528 F.3d at 300 n.4. The fact that Congress' sloppiness was fortuitously lessened years later does not alter the fact that Congress' imprecision makes reliance on the doctrine of *noscitur a sociis* highly questionable.

limited circulation will give rise to a public disclosure while a formal audit conducted by an elected state official that is widely disseminated will not.

Second, the statute expressly states that information available through "a criminal, civil, or administrative hearing" shall constitute a public disclosure. 31 U.S.C. § 3730(e)(4)(A). Every circuit that has considered whether a state "administrative hearing" can give rise to a public disclosure has concluded that such proceedings fall within the scope of 31 U.S.C. § 3730(e)(4). *See Graham County,* 528 F.3d at 303 (citing cases) (Pet. App. 26a). Congress should not be presumed to have split such fine hairs between state administrative hearings and state administrative audits.

Third, as set out above, the Fourth Circuit's decision will encourage opportunistic plaintiffs to scour state government investigations in hopes of finding potential claims that could produce a bounty based on work already performed by the State.

Fourth, the decision below threatens to jeopardize the claims of true whistleblowers who are pursuing false claims investigations based on their own independent knowledge. Under the first-to-file provision of the False Claims Act, the filing of a *qui tam* action by one plaintiff cuts off all subsequently filed *qui tam* actions brought by other plaintiffs. 31 U.S.C. § 3730(b)(5) (2000). Thus, under the Fourth Circuit's opinion, an insider who has worked for years in gathering information in order to expose corruption

could find his *qui tam* action gutted when a complete stranger to the fraud wins the race to the courthouse and files a parasitic lawsuit that is based solely on information available to the public in a state audit.

The Fourth Circuit's decision cannot be squared with either the literal language of the False Claims Act or congressional intent. The Court should grant the petition and reverse the decision of the Fourth Circuit.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September 2008 *Counsel of Record

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OPINION OF THE UNITED STATES COURT OF APPEALS, 4TH CIRCUIT, DECIDED JUNE 9, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA ex rel. KAREN T. WILSON,

Plaintiff-Appellant,

No. 07-1322

v.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; RICHARD GREENE, in his individual capacity; WILLIAM TIMPSON, in his individual capacity; KEITH ORR, in his individual and official capacities; RAYMOND WILLIAMS, in his individual capacity; DALE WIGGINS, in his individual capacity; GERALD PHILLIPS, in his individual capacity; ALLEN DEHART, in his individual capacity; LLOYD MILLSAPS; JERRY WILLIAMS, in his individual capacity; BILLY BROWN, in his individual capacity; LYNN CODY, in his individual capacity; BILL TIPTON; C. B. NEWTON, in his individual capacity; EDDIE WOOD, in his individual capacity; GRAHAM COUNTY,

Defendants-Appellees,

OPINION OF THE UNITED STATES COURT OF APPEALS, 4TH CIRCUIT, DECIDED JUNE 9, 2008

and

GRAHAM COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE COUNTY BOARD OF COUNTY COMMISSIONERS; CHERIE GREENE; RICKY STILES; BETTY JEAN ORR; JOYCE LANE; JIMMY ORR; EUGENE MORROW; CHARLES LANE; CHARLES LANEY; GEORGE POSTELL; LLOYD KISSLEBURG; TED ORR; BERNICE ORR; JOHN DOE, JR.; JOHN DOE CORPORATION; GOVERNMENTAL ENTITIES, 1-99

Defendants.

UNITED STATES OF AMERICA ex rel. KAREN T. WILSON,

Plaintiff-Appellee,

v.

KEITH ORR, in his individual and official capacities; JERRY WILLIAMS, in his individual capacity,

Defendants-Appellants,

and

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; GRAHAM COUNTY

No. 07-1910

OPINION OF THE UNITED STATES COURT OF APPEALS, 4TH CIRCUIT, DECIDED JUNE 9, 2008

BOARD OF COUNTY COMMISSIONERS; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY BOARD OF COUNTY COMMISSIONERS; RICHARD GREENE, in his individual capacity; CHERIE GREENE; WILLIAM TIMPSON, in his individual capacity; RICKY STILES; BETTY JEAN ORR; RAYMOND WILLIAMS, in his individual capacity; DALE WIGGINS, in his individual capacity; JOYCE LANE; GERALD PHILLIPS, in his individual capacity; ALLEN DEHART, in his individual capacity; JIMMY ORR; LLOYD MILLSAPS; BILLY BROWN, in his individual capacity; LYNN CODY, in his individual capacity; EUGENE MORROW; CHARLES LANE; CHARLES LANEY; GEORGE POSTELL; BILL TIPTON; LLOYD KISSLEBURG; C. B. NEWTON, in his individual capacity; EDDIE WOOD, in his individual capacity; TED ORR; BERNICE ORR; JOHN DOE, JR.; JOHN DOE CORPORATION; GOVERNMENTAL ENTITIES, 1-99; GRAHAM COUNTY,

Defendants.

Appeals from the United States District Court for the Western District of North Carolina, at Bryson City.
Lacy H. Thornburg, District Judge.
(2:01-cv-00019-LHT)

OPINION OF THE UNITED STATES COURT OF APPEALS, 4TH CIRCUIT, DECIDED JUNE 9, 2008

528 F.3d 292*; 2008 U.S. App. LEXIS 12264**

Argued: January 29, 2008
Decided: June 9, 2008

Before MOTZ, TRAXLER, and DUNCAN, Circuit Judges.

Vacated and remanded by published opinion. Judge Traxler wrote the opinion, in which Judge Motz and Judge Duncan joined.

COUNSEL

ARGUED: Mark Tucker Hurt, Abingdon, Virginia, for United States of America ex rel. Karen T. Wilson. Christopher G. Browning, Jr., Solicitor General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina; Zeyland G. McKinney, Jr., Robbinsville, North Carolina, for Graham County Soil & Water Conservation District, Cherokee County Soil & Water Conservation District, Richard Greene, in his individual capacity, William Timpson, in his individual capacity, Keith Orr, in his individual and official capacities, Raymond Williams, in his individual capacity, Dale Wiggins, in his individual capacity, Gerald Phillips, in his individual capacity, Allen Dehart, in his individual capacity, Lloyd Millsaps, Jerry Williams, in his individual capacity, Billy Brown,

in his individual capacity, Lynn Cody, in his individual capacity, Bill Tipton, C. B. Newton, in his individual capacity, Eddie Wood, in his individual capacity, Graham County. **ON BRIEF**: Roy Cooper, Attorney General, Raleigh, North Carolina, for Graham County Soil & Water Conservation District, Gerald Phillips, Allen Dehart, Lloyd Millsaps, Cherokee County Soil & Water Conservation District, Bill Tipton, C. B. Newton and Eddie Wood; Sean F. Perrin, WOMBLE, CARLYLE, SANDRIDGE & RICE, P.L.L.C., Charlotte, North Carolina, for Graham County, Raymond Williams, Dale Wiggins and Lynn Cody; Roy Patton, Canton, North Carolina, for Richard Greene and Billy Brown.

OPINION

[*295] TRAXLER, Circuit Judge:

The central issue in this appeal is the scope of the "public disclosure jurisdictional bar contained in the False Claims Act, 31 U.S.C.A. §§ 3729-33 (West 2003 & Supp. 2007).[1] [*296] Addressing an issue that has

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[1]A prior appeal in this case addressed the limitations period that governs retaliation claims brought under the False Claims Act. *See Graham County Soil & Water Conservation Dist. v. United*

divided the circuit courts, the district court concluded that certain audits and reports issued by state and local governmental entities satisfied the requirements of the public disclosure bar and therefore deprived it of subject matter jurisdiction over this action. We conclude that the public disclosure bar applies to *federal* administrative audits, reports, hearings or investigations, but not to those conducted or issued by a state or local governmental entity. Factual questions remain in this case, however, about whether an investigation and report issued by a federal agency satisfy certain other requirements of the public disclosure bar, and those factual issues must be resolved by the district court in the first instance. Accordingly, we vacate the district court's decision rejecting Wilson's claims and its decision denying the defendants' request for attorneys' fees, and we remand for further proceedings.

States ex rel. Wilson, 545 U.S. 409 (2005), *reversing United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 367 F.3d 245 (4th Cir. 2004).

OPINION OF THE UNITED STATES COURT OF APPEALS, 4TH CIRCUIT, DECIDED JUNE 9, 2008

I.

A.

In February 1995, a storm hit parts of western North Carolina, causing extensive flooding and erosion. Defendants Graham County and Cherokee County applied for assistance under the Emergency Watershed Protection Program (the "EWP Program"), a federal disaster assistance program operated by the United States Department of Agriculture (the "USDA") [**4] and administered through the National Resources Conservation Service (the "NRCS") and the United States Forest Service. *See* 7 C.F.R §§ 624.1 - 624.11 (2008). The NRCS entered into agreements with the counties (the "EWP contracts") under which the counties would perform or hire a contractor to perform the necessary clean-up and repair work, with the county bearing 25% of the costs and the USDA bearing the remaining costs.

The EWP contracts permitted the counties to coordinate and perform the clean-up through their soil and water conservation districts. As to the EWP contracts that are relevant to this appeal, Graham County and Cherokee County delegated the work to their soil and water conservation districts. Rather than using their own employees, the conservation districts

decided to hire independent contractors to perform the remediation work.

The EWP program required an NRCS employee to inspect all work done and certify its compliance with the EWP contract before a county could be reimbursed for the costs of the repair work. Typically, the NRCS's government representative would fill out the reimbursement request based on job diaries and the like maintained by those performing the work. [**5] The government representative would submit the reimbursement form to the county for its approval and signature. The government inspector (also an NRCS employee) would inspect the work and certify the claim for payment.

Defendant Richard Greene was the NRCS's district conservationist for the area encompassing Graham and Cherokee counties. Although he was a federal employee, Greene worked out of the offices of the Graham County Soil and Water Conservation [*297] District (the "Graham Conservation District"). Greene was the government representative for the Graham County and Cherokee County EWP contracts, and he was also named one of the government inspectors for those contracts. Defendant Bill Timpson, an NRCS soil conservationist, was also designated as a government

inspector for the Graham County and Cherokee County EWP contracts.

As the government representative for the EWP contracts, Greene was involved in the selection of a contractor to perform the work on behalf of the counties. Greene had difficulty finding a contractor to perform the Graham County EWP work within the time frame called for by the EWP contract. Defendant and cross-appellant Keith Orr was an employee of the Graham Conservation [**6] District. With the approval of Graham County, the Graham Conservation District awarded its EWP work to Orr. Orr was expected to perform the EWP work on his own time, rather than during the hours he was working for the Graham Conservation District, and the parties agreed that he would be paid for the work as any other contractor would be paid. Greene and other federal officials knew that Orr was a conservation district employee and that he had been awarded the EWP work. At Greene's suggestion, the contract to perform Cherokee County's EWP work was awarded to defendant Billy Brown, a friend of Greene's.

Karen Wilson was a secretary for the Graham Conservation District. She contends that in her capacity as secretary, she learned of irregularities in the performance of the EWP contracts by the Graham

Conservation District and by the Cherokee County Soil and Water Conservation District (the "Cherokee Conservation District"). Wilson was troubled by the fact Orr had been hired to perform Graham County's EWP work, and she became suspicious of the arrangements between Greene, Brown, Orr, and Timpson after Orr told her that the men were splitting the proceeds of the EWP contract. One aspect of [**7] the Cherokee County EWP work called for downed trees from the affected area to be used to shore up eroded creek banks. Although Greene told Wilson that the logs had been stolen, she later learned that Greene had sold the logs to a lumbermill and kept the proceeds for himself.[2]

In the summer of 1995, Wilson raised her concerns with various county and conservation district officials. Wilson discussed her concerns with two NRCS employees in November 1995 and sent a letter setting out her concerns to the NRCS state office in December 1995. In November 1996, Wilson was interviewed by an agent from the USDA's Office of Inspector General about the EWP contracts.

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[2]Greene was later convicted in federal district court for misappropriating the logs and other acts of misconduct.

After learning of the problems with the EWP contracts, Graham County officials began an investigation of their own. County officials eventually determined that Orr had charged them for some EWP work that had not been performed. Although the county officials involved with the EWP contracts did not believe that using Orr as an independent contractor was improper, a March 1996 report following an audit performed by an accounting [**8] firm at the request of Graham County (the "Audit Report") raised concerns about the county's failure to seek bids on the work to be performed under the EWP contract and the use of Orr as an independent contractor receiving payment under the EWP [*298] contracts. A May 1996 report prepared by the North Carolina Department of Environment, Health and Natural Resources (the "DEHNR Report") noted the same problems identified in the Audit Report.

B.

In 2001, Wilson commenced this action under the False Claims Act, naming as defendants (among others) Graham County, Cherokee County, Graham Conservation District, Cherokee Conservation District, Greene, Orr, Brown, and Timpson. Wilson alleges that a conspiracy existed between Greene, Orr, Timpson, and Brown. According to Wilson, the men agreed that

Greene would funnel the Graham County and Cherokee County EWP work to Brown and Orr and that Greene and Timpson would inspect the work and approve the bills for payment, with the money paid under the EWP contracts to be shared among the co-conspirators. Wilson contends that the conspiracy effectively tainted the execution of the EWP agreements and rendered the claims for reimbursement false within the meaning [**9] of the False Claims Act.

Wilson also contends that some or all of the claims submitted by the counties to the federal government for reimbursement under the EWP program were false within the meaning of the False Claims Act because: (1) the counties failed to seek bids as required by state law before awarding the EWP work to Orr and Brown; (2) using Orr as an independent contractor created a conflict of interest in violation of the Code of Conduct submitted to the federal government by Graham County; (3) the Graham County work performed by Orr was of poor quality and did not meet the requirements of the EWP contracts; and (4) Greene stole the Cherokee County logs with the knowledge of Cherokee County officials, who permitted Greene to keep the proceeds as a sort of retroactive bribe.

The district court concluded that the Audit Report prepared by local accountants at the request of Graham County and the DEHNR Report were public disclosures of the information underlying Wilson's claims. Because the False Claims Act strips courts of subject matter jurisdiction over private claims based on information that has been publicly disclosed, *see* 31 U.S.C.A. § 3730(e)(4)(A) (West 2003), the district [**10] court concluded that it lacked jurisdiction over Wilson's action. In the alternative, the district court concluded that for various reasons, each of Wilson's claims failed on the merits. The district court therefore granted summary judgment in favor of the defendants, but the court later denied the defendants' requests for attorneys' fees. *See* 31 U.S.C.A. § 3730(d)(4) (authorizing award of attorneys' fees to prevailing defendants in *qui tam* action where the government does not intervene if the court concludes the action "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment").

II.

The False Claims Act (the "FCA") was enacted "during the Civil War in response to overcharges and other abuses by defense contractors, . . . [with the expectation that it] would help the government uncover fraud and abuse by unleashing a posse of *ad*

hoc deputies to uncover and prosecute frauds against the government." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (internal quotation marks omitted). The FCA imposes civil liability (including treble damages and a fine of up to $10,000) on persons who knowingly submit false claims to the government [**11] for payment or conspire to use false claims to obtain payment from [*299] the government. *See* 31 U.S.C.A. § 3729 (West 2003 & Supp. 2007).

FCA actions against the false claimant may be brought by the government itself or by a private person (known as the "relator") on behalf of the government. *See* 31 U.S.C.A. § 3730. Actions brought by a relator are known as "*qui tam*" actions. *See Vermont Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765, 768 n.1 (2000) ("Qui tam is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.'"). The government has the right to intervene in actions brought by a relator, *see* 31 U.S.C.A. § 3730, but a successful relator receives a share of any proceeds recovered in the action whether or not the government intervenes. *See* 31 U.S.C.A. §§ 3730(d)(1)-(2). "A *qui tam* relator [thus] is essentially a self-appointed private attorney general,

and his recovery is analogous to a lawyer's contingent fee." *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992).

The FCA bars federal [**12] courts from exercising subject matter jurisdiction over certain *qui tam* actions. *See Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1405-06 (2007). The only such bar relevant to this case is the public disclosure bar, which provides that

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent

> knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C.A. § 3730(e)(4) (West 2003).

The structure of the public disclosure bar thus requires courts to answer three questions: Was there a public disclosure? If there was a public disclosure, was [**13] the *qui tam* action based on the public disclosure? If the action was based on the public disclosure, was the *qui tam* plaintiff an original source? *See Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 582 (4th Cir. 2000); *see also Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1042 (8th Cir. 2002); *United States v. Bank of Farmington*, 166 F.3d 853, 859 (7th Cir. 1999). If either of the first two questions is answered in the negative, the district court has subject matter jurisdiction over the *qui tam* action. If the first two questions are answered in the affirmative, however, subject matter jurisdiction exists only if the last question is also answered affirmatively.

On appeal, Wilson contends that the Audit Report and DEHNR Report do not qualify as public disclosures under the FCA and that the district court therefore erred by concluding that these reports deprived it of subject matter jurisdiction. Although § 3730(e)(4)(A) provides that an administrative report, audit, or investigation can amount to a jurisdiction-stripping [*300] public disclosure, Wilson argues that the statute applies only to *federal* administrative reports or audits. Because the audit [**14] was conducted by local accountants at Graham County's request and the Audit Report was provided to Graham County officials only, Wilson contends that there was no public disclosure within the meaning of § 3730(e)(4)(A). Wilson likewise argues that the DEHNR Report, which summarized a state investigation and was provided only to state and local officials, was not a public disclosure within the meaning of § 3730(e)(4)(A).

For their part, the defendants contend that the district court correctly determined that the public disclosure bar deprived it of subject matter jurisdiction over Wilson's claims. The defendants argue that there is no language in § 3730(e)(4)(A) expressly limiting its reach to federal rather than state administrative reports and audits, and they note that the majority of

the circuit courts considering the question have rejected Wilson's interpretation of the statute.

A.

"When interpreting a statute, the goal is always to ascertain and implement the intent of Congress." *Scott v. United States*, 328 F.3d 132, 138 (4th Cir. 2003). "The first step of this process is to determine whether the statutory language has a plain and unambiguous meaning. If the statute is unambiguous [**15] and if the statutory scheme is coherent and consistent, our inquiry ends there." *Id.*

Section 3730(e)(4)(A) lists the sources that may give rise to a jurisdiction-stripping public disclosure: disclosures "in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media."[3] 31 U.S.C.A.

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[3]The list of disclosure sources is exclusive; a public disclosure of fraud operates as a jurisdictional bar against a *qui tam* plaintiff's action *only* if the public disclosure is through one of the specified sources. *See Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 870 (4th Cir. 1999); *accord United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734,

§ 3730(e)(4)(A). When considering the scope of the public disclosure bar, courts often separate the relevant language by clause, each of which addresses distinct categories of potential disclosure sources, and then analyze the meaning clause by clause. *See, e.g., Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 870 (4th Cir. 1999) (grouping listed sources into categories for purposes of statutory interpretation); *see also United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917 (9th Cir. 2006) (same), *cert. denied*, 128 S. Ct. 1119 (2008). Thus, the public disclosure bar strips federal courts of jurisdiction over *qui tam* actions that are based upon the public disclosures in (1) "criminal, civil, or administrative hearing[s]"; (2) "congressional, administrative, or Government [**16] Accounting Office[4] report[s],

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744 (3d Cir. 1997); *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1513 n.2 (8th Cir. 1994).

[4]When § 3730(e)(4) was enacted, the official name for the GAO, the familiar federal watchdog agency, was the "General Accounting Office." While the statute speaks of the "Government Accounting Office," it is generally understood that Congress was referring to the GAO. *See* 31 U.S.C.A. § 3730(e)(4)(A) n.3 (stating in footnote following the word [**17] "Government": "So in original. Probably should be

hearing[s], audit[s], [*301] or investigation[s]"; and (3) "the news media." 31 U.S.C.A. § 3730(e)(4)(A). The only category implicated in this case is the second one, which strips federal courts of jurisdiction over *qui tam* actions that are based on public disclosures in a congressional, administrative, or GAO report, hearing, audit, or investigation.

As far as the record reveals, there has been no congressional or GAO action involving the transactions at issue in this case. The jurisdictional question therefore turns upon whether the state- and county-level investigations into and reports about the handling of the EWP contracts can be considered

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'General.'"); *United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 387 (3d Cir. 1999) ("[T]his section refers to the General Accounting Office as the 'Government Accounting Office'. . . ."); *see also United States v. Catholic Healthcare West*, 445 F.3d 1147, 1151 (9th Cir. 2006); *United States ex rel. Gear v. Emergency Med. Assocs. of Ill., Inc.*, 436 F.3d 726, 728 (7th Cir. 2006). This statutory misnomer became somewhat less of a misnomer in 2004, when the GAO was renamed the "Government Accountability Office." *See* GAO Human Capital Reform Act of 2004, Pub. L. 108-271, § 8(a), 118 Stat. 811, 814 (2004).

administrative reports, audits, or investigations within the meaning of § 3730(e)(4)(A).

The few circuits to have considered this question have come to different conclusions. The Third Circuit thus far is alone in [**18] concluding that the public disclosure of state administrative actions does not amount to a public disclosure within the meaning of § 3730(e)(4)(A), *see United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 745 (3d Cir. 1997), while the Ninth Circuit and the Eleventh Circuit have concluded that § 3730(e)(4)(A) encompasses state as well as federal administrative actions, *see United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 918-19 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 1119 (2008); *Battle v. Board of Regents*, 468 F.3d 755, 762 (11th Cir. 2006). In *Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003), the Eighth Circuit took the middle road, not quite agreeing with the Third Circuit or with the Ninth and Eleventh Circuits. The *Hays* court "reject[ed]" the particular manner in which the Third Circuit in *Dunleavy* had parsed the statute. *Id.* at 988. However, the *Hays* court ultimately concluded only that the Third Circuit's holding was broader than necessary, and the court held that state reports and audits could be public disclosures, at least where reports and audits involved a cooperative state-federal program. *See id.* at 989 ("[W]hile we do not disagree with the Third

Circuit's [**19] decision in *Dunleavy*, we conclude the court ruled more broadly than necessary in stating that a state agency disclosure may never be an administrative report or audit for purposes of § 3730(e)(4)(A)." (internal quotation marks and alterations omitted)).

This court has not previously considered whether state or local administrative reports, audits, or investigations can be public disclosures within the meaning of § 3730(e)(4)(A). As the defendants point out, the statute by its express terms does not limit its reach to federal administrative reports or investigations. In our view, however, examination of the relevant language in context and consideration of the structure of the statute leads to the conclusion that only federal administrative reports, audits or investigations qualify as public disclosures under the FCA. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (internal quotation marks omitted)); *Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of [**20] the statute, we look not only to the particular statutory language, [302] but

to the design of the statute as a whole and to its object and policy.").

Of the three disclosure sources listed in clause two of § 3730(e)(4)(A), the first and third are clearly *federal* sources — congressional or GAO reports, hearings, investigations, and audits. Unlike those terms, there is nothing inherently federal about the word "administrative," and Congress did not define the term in the FCA. The placement of the word in the statute, however, provides strong evidence of its intended meaning.

The interpretative maxim *noscitur a sociis* provides that "a word is known by the company it keeps." *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006) (internal quotation marks omitted). The maxim "is invoked when a string of statutory terms raises the implication that the words grouped in a list should be given related meaning." *Id.* (internal quotation marks omitted). "That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham v. United States*, 511 U.S. 368, 371 (1994).

In our view, the placement of "administrative" [**21] squarely in the middle of a list of obviously federal sources strongly suggests that "administrative"

should likewise be restricted to *federal* administrative reports, hearings, audits, or investigations. As the Third Circuit explained:

> [Application of the *noscitur a sociis*] maxim leads to the conclusion that "administrative" when read with the word "report" refers only to those administrative reports that originate with the federal government. We take notice of the fact that Congress and the Government Accounting Office are entities of our federal government. We find it hard to believe that the drafters of this provision intended the word "administrative" to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character.

Dunleavy, 123 F.3d at 745. Although courts must not apply interpretative maxims "woodenly," *Ali v. Federal Bureau of Prisons*, 128 S. Ct. 831, 840 (2008), we believe that reliance on *noscitur a sociis* is appropriate in this case.

If the list in clause two were *entirely* disjunctive, our analysis might be different. Unless context dictates

otherwise, a completely disjunctive formulation (*i.e.*, "item A *OR* [**22] item B *OR* item C") "indicates an intent to give the nouns their separate, normal meanings," *Garcia v. United States*, 469 U.S. 70, 73 (1984), and thus typically makes reliance on *noscitur a sociis* inappropriate, *see In re Continental Airlines, Inc.*, 932 F.2d 282, 288 (3d Cir. 1991) (explaining that "*noscitur a sociis* . . . is of little help where other evidence reveals that Congress intended to treat the disputed term differently from its neighbors"). Section 3730(e)(4)(A), however, uses the more typical form of statutory listing, referring to "congressional, administrative, or Government Accounting Office" reports, audits, and investigations. This formulation does not indicate an attempt by Congress to treat "congressional," "administrative," and "Government Accounting Office" separately.

Moreover, the exclusively federal nature of the terms "congressional" and "Government Accounting Office" is immediately apparent, and these clearly federal terms bookend the not-so-clearly federal term, thus providing a very strong contextual cue about the meaning of "administrative." [*303] *See Ali*, 128 S. Ct. at 839 (refusing to rely on *noscitur a sociis* when interpreting an exception to the Federal Tort [**23] Claims Act's waiver of sovereign immunity where "no relevant common attribute immediately appear[red]"

among the categories listed in the statutory exception and the exception did not contain "strong[ ] contextual cues" that the listed categories should be interpreted similarly).

The defendants, however, contend that limiting clause two to federal administrative reports, audits, or investigations would be inconsistent with the disclosure category of clause one, which addresses disclosures in a "criminal, civil, or administrative hearing." This court and others have understood clause one to encompass state as well as federal hearings. *See McElmurray v. Consolidated Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1252-53 (11th Cir. 2007); *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 332-33 (3d Cir. 2005); *United States ex rel. Reagan v. East Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 174 (5th Cir. 2004); *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1244 (9th Cir. 2000); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir. 1994). The defendants contend that if a state hearing can satisfy the requirements of § 3730(e)(4)(A), [**24] then a state audit, investigation, or report should likewise meet the requirements of the statute. The essence of the defendants' argument in this regard is set out in a district court opinion upon which the defendants rely:

> [L]imiting the word "administrative" to only federal administrative reports, audits and investigations is inconsistent with the plain language of the phrase at issue as well as the language and interpretation of the remaining portions of § 3730(e)(4)(A). The immediately preceding phrase in that statutory section provides that public disclosures include any "criminal, civil, or administrative hearing," and courts have consistently interpreted that phrase to include both *state* and *federal* litigation and administrative hearings. Likewise, this section of the FCA also gives public disclosure status to "the news media" regardless of whether that media is national, state, or local. *There is no reason to conclude that Congress intended to limit administrative reports, audits, and investigations to federal actions, while simultaneously allowing all state and local civil litigation, state and local administrative hearings, and state and local news media to be treated as* [**25] *public disclosures.* To interpret the statute so narrowly would have the anomalous result of allowing public

> disclosure status to the most obscure local news report and the most obscure state and local civil lawsuit or administrative hearing, but denying public disclosure status to a formal public report of a state government agency . . . .

In re Nat. Gas Royalties Qui Tam Litig., 467 F. Supp. 2d. 1117, 1143-44 (D. Wyo. 2006) (underscored emphasis added; footnote and citations omitted); *see also Bly-Magee*, 470 F.3d at 918 ("[T]he statute would seem to be inconsistent if it included state and local administrative hearings as sources of public disclosures and then, in the next breath, excluded state administrative reports as sources.").

Although we ultimately disagree with this approach to the statute, we must admit that there is some force to the argument. The courts have easily concluded that clause one applies to state-level hearings--in fact, only one court thus far has explicitly addressed the possibility that clause one should be limited to federal hearings, *see A-1 Ambulance Serv.*, 202 F.3d at 1244--and there is some logic and [*304] symmetry to taking a similar approach to clause two.

Nonetheless, [**26] we believe that this analysis has its own shortcomings. First of all, we note that

both clause one and clause two refer to administrative hearings: Clause one states that public disclosures can occur in "criminal, civil, or administrative hearing[s]," and clause two states that public disclosures can occur in "congressional, administrative, or Government Accounting Office report[s], hearing[s], audit[s], or investigation[s]." 31 U.S.C.A. 3730(e)(4)(A). If clause one and clause two both encompass state administrative hearings, as the defendants contend, then there was no reason for Congress to repeat the word "hearings" in clause two. *See A-1 Ambulance Serv.*, 202 F.3d at 1245 ("*Dunleavy*'s interpretation buttresses our conclusion [that clause one is not limited to federal administrative hearings] because one may presume that Congress acted intentionally in including the modifying language in one clause, but omitting it in another. It is unlikely that Congress would have referenced administrative hearings twice in the same sentence, unless it intended to allude to different contexts." (citation omitted)).[5]

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[5]Because courts have interpreted clause one to encompass state and federal hearings, [**27] either interpretation of clause two yields some amount of redundancy. Under the *Dunleavy* approach, the statute as interpreted by the courts is redundant because federal administrative hearings would qualify as sources of public disclosures under clause one or

More importantly, however, to adopt the interpretative approach urged by the defendants would require us to all but ignore the significance of the inherently federal language chosen by Congress [**28] in clause two. As reflected in the analysis of district court quoted above, the defendants' approach to the statute suggests that because neither clause one nor clause two limit their reach to federal sources, we therefore should not view clause two's references to Congress and the GAO as limiting the reach of clause two. We find this argument unpersuasive.

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clause two. Under the interpretation urged by the defendants, the statute unnecessarily refers to administrative hearings in both clause one and clause two. While we would of course prefer to avoid all redundancies, the redundancy that exists under the *Dunleavy* approach is a latent one—that is, the redundancy is a function of the interplay between the judicial interpretations of clause one and clause two. The defendants' approach to the statute, however, creates a patent redundancy in the language affirmatively chosen by Congress. Given the choice between tolerating a judicially-created redundancy or rendering redundant language chosen by Congress, the former seems more consistent with traditional principles of statutory construction.

Preliminarily, we note that in this country there is no "federal" news media, nor for that matter is there any "state" news media from which "federal" news media could be distinguished. Of course, some news media are national in scope and reach while others are local, but "national" in this context cannot be equated with "federal." It thus seems inappropriate to draw significance from the statute's failure to attach any qualification or limitation to public disclosures that are made by the news media.

More generally, however, we believe the defendants' interpretation of clause two is contrary to the basic principle that, where possible, courts should give effect to every word in a statute. *See, e.g., Clinchfield Coal Co. v. Harris*, 149 F.3d 307, 313 (4th Cir. 1998). If Congress had intended clause two to encompass state audits, reports, [**29] or investigations, it could have saved a few words by referring to disclosures in *governmental* audits, reports, or investigations, a phrasing that avoids the use of [*305] words that are inherently and exclusively federal in nature. Congress instead provided that the jurisdictional bar applies to disclosures in a "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation." We believe this use of inherently federal modifiers was deliberate and significant, and that it would be improper to discount its significance

simply because there is no similar limiting language in clause one or clause three. *Cf., e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks and alteration omitted)).

We would not be the first court to observe that the FCA's public disclosure bar is far from a model of careful draftsmanship. *See Mistick PBT*, 186 F.3d at 387, 388 (stating that § 3730(e)(4)(A) "does not reflect [**30] careful drafting or a precise use of language," and describing it as "syntactically ambiguous"); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 681 (D.C. Cir. 1997) ("Virtually every court of appeals that has considered the public disclosure bar explicitly or implicitly agrees on one thing, however: the language of the statute is not so plain as to clearly describe which cases Congress intended to bar."). While it may not be the strongest of interpretative principles, we nonetheless believe that the *noscitur a sociis* principle is the best tool short of a secret decoder ring with which to gain insight into the meaning of this murky statute.

And when we consider the congressional fine-tuning of the FCA over the years, we believe it provides further support for the understanding of the statute suggested by application of *noscitur a sociis*. Since the enactment of the FCA, Congress twice has passed major revisions intended to strike the proper balance "between encouraging private citizen involvement in exposing fraud against the government while preventing opportunistic suits by private persons who became aware of fraud but played no part in exposing it." *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 702 (8th Cir. 1995).

Perhaps [**31] the most notorious of these opportunistic (or "parasitic" suits[6]) is *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). In *Hess*, because there was no statutory language prohibiting it, the Supreme Court upheld a verdict in favor of a *qui*

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[6]"[P]arasitic lawsuits copied from preexisting indictments or based upon congressional investigations . . . not only diminished the government's ultimate recovery without contributing any new information, but the rush to the courthouse put pressure on the government to make hasty decisions regarding whether to prosecute civil actions." *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 679-80 (D.C. Cir. 1997).

tam relator who copied his information about fraud by a government contractor directly from the allegations in a criminal indictment brought by the federal government against that contractor. *See id.* at 546-48.

In response to *Hess*, Congress in 1943 amended the FCA to deprive courts of jurisdiction over *qui tam* actions that were based on evidence or information in the government's possession when the *qui tam* action is filed. *See Findley*, 105 F.3d at 680. While the 1943 amendments did close the door to parasitic [**32] actions, the amendments likewise closed the door to the very claims the *qui tam* provisions were originally intended to encourage -- [*306] claims brought by "those whistleblowers who furnished evidence or information to the government in the first place." *Id.* Congress eventually realized that by "eliminat[ing] the financial incentive to expose frauds against the government," the 1943 amendments "had killed the goose that laid the golden egg" and resulted in a dramatic decrease in the use of *qui tam* actions to combat fraud. *Id.* Congress amended the FCA in 1986, again aiming for "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Springfield Terminal Ry Co. v. Quinn*, 14 F.3d 645, 649

(D.C. Cir. 1994). The 1986 amendments, among other things, eliminated the government-knowledge jurisdictional bar that had been added to the FCA in 1943 and replaced it with the public-disclosure bar at issue in this action. *See id.* at 651.

In our view, the defendants' interpretation of the statute becomes untenable when we [**33] recognize that the public-disclosure bar was the product of Congress's repeated efforts to further the "twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *Id.*; *see also United States ex rel. LaCorte v. Wagner*, 185 F.3d 188, 191 (4th Cir. 1999) (recognizing that with the 1986 amendments to the FCA, "Congress struck a careful balance between encouraging citizens to report fraud and stifling parasitic lawsuits").

Information about federal investigations and audits is easily available to the members of the Department of Justice charged with enforcing the FCA. Prohibiting *qui tam* actions based on public disclosure of these federal investigations is completely consistent with the goal of discouraging actions that the government is capable of pursuing itself. We cannot conclude, however, that information about most state and local investigations, audits, or reports is particularly likely

to come to the attention of the federal government. State or local audits and investigations often involve a small number of public employees and address issues that directly affect a very small [**34] segment of the local population. The general public often is not aware that an audit or investigation is being conducted, and the outcome of the audit or investigation may receive little or no publicity. Moreover, there is no central location (like a county courthouse with a searchable docket) where information about such proceedings is kept and made available to the public. The likelihood of the federal government learning about the audit or investigation or the underlying information is thus very small.

Because the federal government is unlikely to learn about state and local investigations, a large number of fraudulent claims against the government would go unremedied without the financial incentives offered by the *qui tam* provisions of the FCA. If the public-disclosure bar were to encompass investigations and reports at the state and local level, as the defendants contend, the effect would be to discourage private actions that the federal government is *not* capable of pursuing on its own, thus frustrating rather than furthering the goals of the FCA.

Accordingly, given the grammatical structure of § 3730(e)(4)(A), we agree with the Third Circuit that the phrase "congressional, administrative, [**35] or [GAO] report, hearing, audit, or investigation" is properly understood to include only federal administrative reports, hearings, audits, or investigations.[7] [*307] Because the Audit Report was prepared by the county and the DEHNR Report was produced by the state, the reports were not public disclosures within the meaning of § 3730(e)(4)(A). The

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[7]Although it is not dispositive, we note that the United States intervened on appeal in *Hays* to urge the Eighth Circuit to follow the Third Circuit's decision in *Dunleavy*. *See* Brief for the United States of America as Intervenor, 2002 WL 32181440, at *38-41 (May 2002). At the invitation of the Supreme Court, the United States also filed an amicus brief in connection with the petition for certiorari filed after the Ninth Circuit's decision in *Bly-Magee*. The United States again expressed support for the Third Circuit's reading of the public disclosure bar but recommended that the Supreme Court wait for further developments in the law before reviewing the issue. *See* Brief for the United States as Amicus Curiae, 2007 WL 4613626, at *7 (Dec. 21, 2007). [**36] The Supreme Court denied the *certiorari* petition. *See United States ex rel. Bly-Magee v. Premo*, 128 S. Ct. 1119 (2008).

district court therefore erred in concluding that these reports worked to deprive it of subject matter jurisdiction over Wilson's *qui tam* action.

B.

As previously noted, Wilson in November 1996 cooperated with a federal investigation into the Cherokee and Graham County EWP contracts, speaking on multiple occasions to an agent from the USDA's Office of Inspector General. The USDA eventually issued a report in which it concluded that while there were problems with the administration of the Graham and Cherokee EWP contracts, there was no conspiracy between Greene, Orr, Timpson, and Brown. Although it is not entirely clear, it appears from the district court's order that the court also viewed this investigation and report as a public disclosure that deprived it of jurisdiction over Wilson's action. Neither Wilson nor the defendants in their briefs devote much attention to the USDA investigation or report. Nonetheless, because the FCA's public disclosure bar is jurisdictional, we are obliged to consider the issue on our own. *See Rockwell*, 127 S. Ct. at 1406.

Because the USDA investigation and report were conducted and issued by a federal agency, they qualify

as an administrative hearing or report under our reading [**37] of § 3730(e)(4)(A). There are, however, additional questions that must be resolved as part of the public disclosure inquiry: whether the investigation or report were publicly disclosed, and if so, whether the claims asserted in Wilson's *qui tam* complaint were "based upon" the public disclosure.

(1)

The mere existence of an administrative investigation or report is not enough to trigger the jurisdictional bar of § 3730(e)(4)(A). Instead, the investigation or report amounts to a jurisdiction-stripping public disclosure only if the investigation or report is in fact publicly disclosed. *See, e.g., Grayson*, 221 F.3d at 582; *Siller*, 21 F.3d at 1350.

The district court did not expressly find that either the USDA investigation or report were publicly disclosed, and the record does not contain sufficient evidence on this point that would permit this court to determine as a matter of law whether the investigation or report were publicly disclosed. We must therefore remand to permit the district court to make the necessary factual finding.

(2)

A federal administrative investigation or report will operate as a bar to the exercise of subject matter jurisdiction over a *qui* [*308] *tam* action only if the *qui* [**38] *tam* claims are "*based upon* the public disclosure" of the allegations in the report. 31 U.S.C.A. § 3730(e)(4)(A) (emphasis added).

Most circuits have held that "a *qui tam* suit is 'based upon' a public disclosure whenever the allegations in the suit and in the disclosure are the same, 'regardless of where the relator obtained his information.'" *Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1044-47 (8th Cir. 2002) (adopting majority rule and collecting cases). In this circuit, however, a *qui tam* action is based upon publicly disclosed allegations *only* if the *qui tam* plaintiff's allegations were actually *derived from* the public disclosure itself:

> To "base upon" means to "use as a basis for." Rather plainly, therefore, a relator's action is "based upon" a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based.

Siller, 21 F.3d at 1348; *accord United States ex rel. Fowler v. Caremark RX, LLC*, 496 F.3d 730, 737-38 (7th Cir. 2007). Under *Siller*, a *qui tam* action will not be barred if the plaintiff's claims are similar or even identical to the publicly disclosed [**39] allegations, so long as the plaintiff had independent knowledge of the facts and did not derive his allegations from the public disclosure itself.

Whether a *qui tam* plaintiff's FCA claims were derived from a public disclosure as defined in § 3730(e)(4)(A) is a question of fact, *see Siller*, 21 F.3d at 1349, but it is not clear from the district court's order that the court made the required factual finding. Although the district court in its order recited the "derived from" standard, the district court never explicitly held that Wilson's claims were derived from any of the documents that the district court viewed as public disclosures, much less that her claims were derived from the USDA investigation or report. If anything, the district court's abbreviated analysis seems to suggest that the court in fact applied the broader "based on" standard used in other circuits rather than *Siller*'s more stringent "derived from" standard.

In a portion of the opinion focusing on the effect of the county-issued Audit Report, the district court

stated that, "to the extent that any allegations of the complaint *overlap this information*, the jurisdictional bar would apply unless Wilson shows by a preponderance [**40] of the evidence that she was an original source of the information upon which these statements were based." J.A. 1750. As noted above, we held in *Siller* that the mere similarity of the plaintiff's allegations to the public allegations is irrelevant; what matters is whether the plaintiff actually derived her claims from the public disclosure itself. By focusing on whether Wilson's allegations merely *overlapped* the allegations of the Audit Report, it appears that the district court applied the wrong standard when determining whether the public-disclosure bar applied.

Because the district court made no findings as to whether the USDA investigation or report was publicly disclosed or whether Wilson's claims were derived from the USDA investigation or report, we cannot at this juncture determine whether the public-disclosure bar applies. Accordingly, we must vacate the district court's decision and remand to give the district court the opportunity to make the necessary factual determinations. *See Siller*, 21 F.3d at 1349 ("[B]ecause the district court made no finding on whether Siller actually derived his allegations from the SSI suit, a finding necessary to the conclusion that Siller's action [**41] was 'based upon' that suit, [*309] we . . . vacate

the portion of the district court's order dismissing Siller's action so as to enable the court to address this factual question on remand."); *see also United States ex rel. Boothe v. Sun Healthcare Group, Inc.*, 496 F.3d 1169, 1177 (10th Cir. 2007) ("Because the application of the 'based upon' and 'original source' tests turn on important factual questions, ones on which we have no record before us, we think the appropriate course is to remand the matter for the district court's consideration in the first instance."); *United States v. A.D. Roe Co.*, 186 F.3d 717, 726 (6th Cir. 1999) (vacating and remanding so that district court could make necessary factual findings as to whether *qui tam* plaintiff's claims were based on publicly disclosed information).

On remand, the district court shall permit the parties to submit additional evidence as may be necessary for the court to make the factual determinations upon which the jurisdictional questions turn. If the district court determines that the USDA investigation or report was publicly disclosed and that Wilson's claims were derived from those public disclosures, the court must then determine whether [**42] Wilson is an original source as to any of her claims. When considering these jurisdictional questions, the district court should keep in mind that, as the Supreme Court made clear in *Rockwell*, it is not enough for a *qui tam* plaintiff to show that jurisdiction

exists over one of her claims. Instead, a *qui tam* plaintiff must establish that jurisdiction exists over *each* individual claim. *See Rockwell*, 127 S. Ct. at 1410 ("Section 3730(e)(4) does not permit jurisdiction in gross just because a relator is an original source with respect to some claim. . . . [A] plaintiff's decision to join all of his or her claims in a single lawsuit should not rescue claims that would have been doomed by section (e)(4) if they had been asserted in a separate action. And likewise, this joinder should not result in the dismissal of claims that would have otherwise survived." (internal quotation marks omitted)). The district court's analysis should thus proceed on a claim-by-claim basis, individually addressing "each reasonably discrete claim of fraud" and explaining whether the court has jurisdiction over that claim. *Boothe*, 496 F.3d at 1177.

III.

As mentioned previously, the district court, in an alternative [**43] ruling, addressed and rejected Wilson's claims on the merits. While we appreciate the district court's concern for judicial economy, it was error for the court to address the merits of Wilson's claims after concluding that it lacked subject matter jurisdiction over the action. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191

(2007) ("Without jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case." (internal quotation marks omitted)); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case."). And because we cannot yet determine whether subject matter jurisdiction exists, we similarly are unable to consider the merits of the appeal or cross-appeal. Accordingly, we vacate the district court's decisions granting judgment to the defendants and denying attorneys' fees to the cross-appellants, and we remand for further proceedings consistent with this opinion.

If on remand the district court again concludes that the public [**44] disclosure bar [*310] applies and deprives the court of subject matter jurisdiction, then the court should not consider the merits of Wilson's claims. If, however, the court concludes that it has jurisdiction over some or all of Wilson's claims, the district court may then proceed to consider the merits of those claims. If the court believes that its prior opinion rejecting Wilson's claims on the merits sufficiently addresses all relevant issues, the court may issue an opinion adopting the relevant portions of the prior opinion. And if the district court rejects

Wilson's claims on jurisdictional grounds or on the merits, it should again consider the defendants' requests for attorneys' fees, and the court may adopt its prior analysis of the fee request or address the issue anew. We emphasize, however, that nothing in our mandate should be read to preclude the district court from considering the merits of the *qui tam* claims anew or, if the court deems it appropriate, permitting the parties to submit additional evidence or argument supporting their claims.

VACATED AND REMANDED

MEMORANDUM OFTHE UNITED STATES DISTRICT COURT, W.D.N.C., DECIDED MARCH 13, 2007

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA BRYSON CITY DIVISION

CIVIL NO. 2:01CV19

UNITED STATES *ex rel.*, KAREN T. WILSON,

Plaintiffs,

Vs.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; GRAHAM COUNTY; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; RICHARD GREENE, in his individual capacity; WILLIAM TIMPSON, in his individual capacity; KEITH ORR, in his individual and official capacities; GERALD PHILLIPS, in his official capacity; RAYMOND WILLIAMS, in his official capacity; DALE WIGGINS, in his official capacity; ALLEN DEHART,

in his official capacity; LLOYD MILLSAPS, in his official capacity; BILLY BROWN, in his individual capacity; LYNN CODY, in his official capacity; BILL TIPTON, in his official capacity; C. B. NEWTON, in his official capacity; and EDDIE WOOD, in his official capacity,

Defendants.

MEMORANDUM OF OPINION

THIS MATTER is before the Court on the Defendants' motions for summary judgment.

I. ALLEGATIONS OF THE THIRD AMENDED COMPLAINT

By virtue of various procedural rulings, the only claim left in the action is one pursuant to the False Claims Act based on allegations contained in Section A of the Third Amended Complaint, filed July 31, 2006. Those allegations involve Karen Wilson's (Wilson) position as a part-time secretary for the Graham County Soil & Water Conservation District beginning in 1993[1]. In response to damages sustained

[1]Wilson brought this *qui tam* action as the relator; however, the United States has declined to intervene.

from a storm in February 1995, the federal government entered into a program known as EWP-216[2] for Graham, Cherokee and Clay Counties in North Carolina. The complaint alleges that Defendant Keith Orr (Orr), an employee of the Graham County Soil & Water Conservation District, was an inspector for the EWP-216 program.

Among the actions which Wilson claims were in violation of the False Claims Act are the following:

1. Orr presented a claim for payment for unidentified services to the Graham County Soil & Water Conservation District on June 20, 1995, in the amount of $5,130. The claim was to be paid from the EWP-216 program. The claim was improper due to Orr's conflict of interest as a result of his position as an inspector and also because no bids had been entertained for the contract.

2. The Graham County Soil & Water Conservation District approved the payment of these funds although it was aware that such payment was improper.

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[2]The program was established by a grant pursuant to the Emergency Watershed Protection Program (EWP).

3. On August 31, 1995, a check was issued to Orr in the amount of $6,725.00 from Graham County for work allegedly done for the Graham County Soil & Water Conservation District under the EWP-216 program.

4. On October 4, 1995, Graham County issued a check for $2,700 to Orr for work allegedly done under the EWP-216 program although no contract existed.

5. On July 12, 1996, Graham County issued a check to Orr in the amount of $1,957.50 for work allegedly done on the EWP-216 program. The finance officer for the county, Sharon Crisp, included a notarized statement on the check which stated that she was issuing it "under duress and against [her] will and better judgment."

6. Wilson was instructed by Defendant Gerald Phillips (Phillips), who was a supervisor for the Graham County Soil & Water Conservation District, that she should pay Orr's claims whether he had actually done any work or not. Phillips conspired with other members of the Graham County Soil & Water Conservation District to pay such claims by holding a closed board meeting in July 1996 with Defendants Allen Dehart (Dehart), Orr, Defendant Richard

Greene[3] (Greene), Defendant William Timpson (Timpson) and Ronald Orr.

7. Greene and Timpson approved the payments to Orr which they then shared among themselves.

8. Part of the EWP-216 program involved the removal of logs from private property. Orr, Greene and Timpson improperly sold those logs to Valwood Corporation and divided the proceeds among themselves. Wilson alleges that this occurred on approximately 24 occasions.

9. EWP-216 programs had also been established for Cherokee and Clay Counties. Orr, Greene, Timpson, Defendant Billy Brown (Brown) and his company, Brown Construction Company, made false claims in connection with that program, the proceeds of which were divided among these individuals.

10. Defendants C.B. Newton (Newton), Bill Tipton (Tipton), and Eddie Wood (Wood) were supervisors for the Cherokee County Soil & Water Conservation District. They approved the payment of false claims to both Brown and Orr.

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[3]The complaint alleges that Greene was an employee of the Natural Resources Conservation Service (NRCS).

11. The Cherokee County Soil & Water Conservation District tried to conceal these payments. On December 7, 1995, the district's chairman, Lloyd Kisselburg, falsely represented to the chairman of the Graham County Soil & Water Conservation District, Bruce Lewis, that no such payments had been made to Orr.

12. Wilson alleges that these improper actions were taken in order to curry political and personal favor.

Based on these allegations, Wilson claims the Defendants violated the False Claims Act by knowingly presenting to the United States Government false or fraudulent claims, knowingly making false records in order to obtain payment of false claims, and conspiring to defraud the Government by such acts.

II. THE JURISDICTIONAL BAR OF THE FALSE CLAIMS ACT

"The False Claims Act deprives the district court of jurisdiction over a qui tam action that is based on allegations or transactions previously publicly disclosed, unless the relator is the original source of the allegations." ***United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 916 (9th Cir. 2006) (citing 31**

U.S.C. § 373(e)(40(A). The relator has the burden of establishing this subject matter jurisdiction by a preponderance of the evidence. ***Id.* at n.2.**

Specifically, the False Claims Act provides that

> [n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in [an] . . . administrative . . . report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> "[O]riginal source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. §3730(e)(4). The Fourth Circuit has summarized the statute as requiring dismissal for lack of subject matter jurisdiction "if the qui tam complaint was 1) 'based upon' information 2) that was 'publicly disclosed' and 3) [Wilson was] not the 'original source' of this information. ***Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 582 (4th Cir. 2000).** "Based upon" means "derived from." ***Id.*** To prove that she is the "original source," Wilson must show "'direct and independent knowledge of the information on which the allegations are based and ha[ve] voluntarily provided the information to the Government before filing [suit].'" ***Id.* at 583 (quoting 31 U.S.C. § 3730(e)(4)(B).** "'A putative relator's knowledge is 'direct' if [she] acquired it through [her] own efforts, without an intervening agency, and it is 'independent' if the knowledge is not dependent on public disclosure.'" ***Id.* (quoting United States ex rel. Detrick v. Daniel F. Young, Inc., 900 F. Supp. 1010, 1016 (E.D. Va. 1995)) (other citations omitted).**

III. ELEMENTS OF A FALSE CLAIMS ACT CLAIM

The elements of a False Claims Act claim are: "(1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the

requisite scienter, [knowingly]; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due." ***Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999).** The question of materiality, albeit a mixed question of law and fact, is one for the Court in a False Claims Act case. ***Id.*; *accord, United States ex rel. Berge v. Bd. of Trustees of the Univ. of Alabama*, 104 F.3d 1453 (4th Cir. 1997).** A false statement is "material" if it "has a natural tendency to influence agency action or is capable of influencing agency action." ***Harrison, supra*, at 785-86.** As for the scienter requirement, "knowingly" under the False Claims Act means that a person "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information; [however] no proof of specific intent to defraud is required." ***Id.* at 785.**

IV. STATEMENT OF FACTS

The Emergency Watershed Protection Program (EWP) falls under the auspices of the Natural Resources Conservation Services (NRCS) Watershed Program and the NRCS is an agency of the United States Department of Agriculture. **Attachment A to Exhibit 1, Deposition of Jacob Crandall, attached**

to Motion of Defendants Graham County, Raymond Williams, Dale Wiggins and Lynn Cody ["Graham County Defendants"] for Summary Judgment, filed December 1, 2006, at 10-11, 50. Thus, the NRCS is a federal governmental agency which has the responsibility of administering the EWP program on a nationwide basis. ***Id.* at 77.** Jacob Crandall, an employee of the NRSC, was the area conservationist for 29 counties in western North Carolina during the time at issue. ***Id.* at 10.** Crandall explained how the EWP programs worked in conjunction with local state governmental agencies. After a natural disaster occurred in one of his 29 counties, he and his engineer would assess the damage from the standpoint of soil conservation and emergency watershed protection. ***Id.* at 14.** If a county government expressed interest in participating in the EWP program and received approval, NRCS would pay 75 percent of the cost with the remaining 25 percent being paid by the county or state. ***Id.*** The request for participation went to the state conservationist, another NRCS employee who was also Crandall's supervisor. ***Id.*** The state conservationist would assess the request which was then sent to NRCS in Washington, D.C., for approval. ***Id.*** If the Washington office approved the request, then Crandall was notified that the funds for the EWP program had been approved. ***Id.* at 15.** At that point, Crandall's field office would again assess

the damage and obtain an estimate for repair. ***Id.*** If the damage was eligible for the EWP program, then Crandall would assist the county in formatting the agreement, called a local contract, between the agencies. ***Id.*** Despite the layers of bureaucracy, this approval process occurred rather swiftly due to the emergency nature of the repairs.

Crandall testified that when the contract was a performance of work agreement,[4] the county had the option to use their own employees to perform the work required by the agreement or it could choose to contract out the work. ***Id.* at 66.** Nonetheless, if the county determined to contract out the work, the county was not obligated to seek bids on the contract. ***Id.*** There was no federal or local policy which would have prevented a county technician, such as Defendant Keith Orr, from actually doing the work. ***Id.*** However, once the work was completed, certification that the work was both complete and proper was

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[4]A performance of work agreement is an agreement pursuant to which the NRCS regulations allow the county to perform the work with its own employees or to enter into an agreement with the local soil and water conservation district to perform the work. **Exhibit 2, Declaration of Elizabeth Caldwell, *attached to* Graham County Defendants' Motion, ¶ 8.**

provided by federal employees of NRCS, that is, individuals who worked under Crandall's supervision. ***Id.* at 47-48.** It was the responsibility of the NRCS employees to verify that the work complied with the contract. ***Id.* at 69.** Thus, no payment for work could be made until the government representative and government inspector, both of whom were NRCS employees, had certified that the work was in compliance. ***Id.*** Inspection done by any other individual, such as a local county or state agency employee, would not be sufficient for payment to be made from federal funds. ***Id.***

In February 1995, there was severe flooding in western North Carolina. ***Id.* at 59.** Crandall's engineer, Howard Tew, as part of his job, assessed the damage from those floods and reported to Crandall. ***Id.*** Because Graham County wanted to participate in an EWP program, Crandall assisted in negotiating a project agreement with Graham County but he sent the actual contract to the NRCS district conservationist, Defendant Richard Greene, whose responsibility it was to work with the local county agent. ***Id.* at 60-61, 62.** According to Crandall, it was Greene's responsibility as the NRCS district conservationist to advise the local agencies whether or

not they were required to bid out the projects.[5] **Crandall Deposition, *attached to* Motion of Defendants' Cherokee County Soil & Water Conservation District, Bill Tipton, Eddie Wood and C. B. Newton ["Cherokee SWCD Defendants"] for Summary Judgment, filed December 1, 2006, at 49-50.** Greene also functioned as the government representative for NRCS. It was part of his job as the government representative to review and approve forms submitted for payment in connection the EWP-216 project by the local agencies. ***Id.* at 44.** In fact, it was not unusual for the government representative to actually prepare this form for signature by the county. ***Id.***

Project Agreement 69-4532-5-630[6] was entered into been the Graham County Board of Commissioners and the NRCS on March 27, 1995. **Deposition Exhibit 1, *attached to* Crandall Deposition, *attached to* Graham County Defendants' Motion.** The contract called for stream debris removal and disposal, along with labor and re-vegetation. ***Id.*** Graham County was to provide 25 percent of the cost of the contract

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[5]Although not dispositive, it appears that this was the first time either Graham or Cherokee counties had participated in this program.

[6]This project is referred to as the "630" project.

estimated to be $4,425.00. ***Id.* ¶ C.1.** NRCS was to pay 75 percent of the cost in the amount of $13,275.00. ***Id.* ¶ D.1.** The County received bids from various contractors for the work required under this agreement and the job was awarded to two different contractors. **Attachment G, Deposition of Dale Wiggins, Vol. 2, attached to Graham County Defendants' Motion, at 89-90.** The equipment rental portion of the contract was awarded to Phillips and Jordan while the removal contract was awarded to Snowbird Logging. ***Id.* at 89-94.**

Project Agreement 69-4532-5-650[7] was entered into between the Graham County Board of Commissioners and the NRCS on June 5, 1995. **Crandall Deposition, *supra*, at 60; Deposition Exhibit 2, *attached to* Crandall Deposition.** This contract was a performance of work agreement. ***Id.*** Graham County was obligated to provide 25 percent of the cost estimated at $9,521.25, and NRCS was to pay 75 percent or $28,563.75. ***Id.* ¶¶ C.1., D.1.** Graham County entered into an agreement with Graham County Soil & Water Conservation District to do this work. Because this was a performance of work agreement, neither Graham County nor the District was required to bid out any work done by sub-contractors. **Exhibit 2, Declaration of**

[7]The project is referred to as the "650" agreement.

Elizabeth Caldwell, *attached to* Graham County Defendants' Motion, ¶ 9. Defendant Keith Orr, who was an employee of the Graham County Soil & Water Conservation District,[8] performed this work. **Attachment E, Deposition of Dale Wiggins, Vol. 1, *attached to* Graham County Defendants' Motion, at 81-82, 94.** Greene testified that he had trouble finding someone who was willing to do this work which

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[8]The Plaintiff has incorrectly alleged in her response that Orr's salary was paid half by the County and half by the District. **Relator's Opposition to Graham County Defendants' Motion for Summary Judgment, filed December 18, 2006, at 4.** In fact, Orr was employed by the Graham County Soil & Water Conservation District as a North Carolina Ag Cost Share Technician. **Attachment G, Deposition of Keith Orr, *attached to* Relator's Opposition to Graham County Defendants' Motion, at 27.** The funding for that position came from the State of North Carolina and Graham County Soil & Water Conservation District. ***Id.*** Orr's paycheck came from the District, not Graham County. ***Id.* at 37.** His salary was paid from the District of which he was a full-time employee even though the State of North Carolina provided funding for his position. ***Id.* at 40.** The Plaintiff alleged that Orr was an employee of Graham County in order to apply conflict of interest rules to him.

had to be done as quickly as possible. **Attachment B, Deposition of Richard Greene, Vol. 1, *attached to* Exhibit 1, Declaration of Sean Perrin, *attached to* Graham County Defendants' Reply to Plaintiff's Opposition to its Motion for Summary Judgment, filed December 21, 2006, at 18, 32.** Orr was willing to do the work and gave the Graham County Soil & Water Conservation District a price which they accepted. ***Id.*** Greene testified he spoke with the Graham County Soil & Water Conservation District about the role they would take in this project. **Exhibit 2, Excerpts from Greene Deposition, *attached to* Motion of Defendants Graham County Soil & Water Conservation District, Allen Dehart, Gerald Phillips, and Lloyd Millsaps ["Graham SWCD Defendants"] for Summary Judgment, filed December 1, 2006, at 15.** The District did not have to become involved with the project; they could have allowed the County to handle it. ***Id.*** However, the Raleigh office of NRCS advised that Graham County should be the contracting local agency with NRCS. ***Id.* at 15-16.** This then allowed the County to have the option of offering a performance of work contract to the District without being obligated to bid out the work. ***Id.*** Therefore, structuring the EWP-216 program in this manner was the suggestion of NRCS. ***Id.* at 27.** "Performance of work per the national contracts and agreement manual, does not require

bidding on performance of work." ***Id.* at 28.** Greene advised both the County and the District that this was proper. ***Id.* at 63-64.**

The Cherokee County Board of Commissioners[9] entered into two agreements with the NRCS in 1995: an equipment rental agreement, Project Agreement 69-4532-5-628;[10] and a performance of work agreement, Project Agreement 69-4532-5-640.[11] **Exhibit 1, *attached to* Cherokee SWCD Defendants' Motion, at Bates Nos. 00005-6.** These agreements also arose from the flooding which occurred in western North Carolina in February 1995. Because the 640 agreement, entered into on May 4, 1995, was a performance of work agreement, neither Cherokee County nor Cherokee County Soil & Water Conservation District bid out the work and bidding

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[9]The Cherokee County Board of Commissioners is not a defendant in this action. The named defendant is the Cherokee County Soil & Water Conservation District.

[10]This agreement will be referred to as the "628" agreement. Wilson has not alleged any improprieties in connection with the equipment rental agreement.

[11]This agreement will be referred to as the "640" agreement.

was not required. ***Id.* at Bates No. 00028 (Crandall Deposition, at 52).** On June 26, 1996, Tew, in his capacity as an NRCS employee, certified that final inspection of the project had occurred and all work had been properly completed. ***Id.* at Bates No. 00030.** On July 11, 1996, Tew, again acting as a NRCS employee, submitted to the contracting officer for Cherokee County, Richard Honeycutt, Forms SCS-AS-49A and SCS-AS-49b for final payment. ***Id.* at Bates 00031.** Tew, as the government representative, provided the information on those forms. ***Id.***

When an individual or county performed such work, federal form SF-270 was submitted for review to the NRCS administrative officer, who in 1995 was Dennis Berkstresser. **Attachment A, Crandall Deposition, *attached to* Graham County Defendants' Motion, at 81.** It was Berkstresser's job to review the form for accuracy, that is, to make sure that the amount sought for reimbursement was the actual expense approved in the project agreement. ***Id.* at 81-82.** Crandall testified that he had no reason to believe that Graham County sought reimbursement from the federal government under either of the two project agreements for work that was never done. ***Id.* at 66.**

In December 1995, after receiving complaints from Wilson, Crandall removed Greene and Timpson[12] of their duties in connection with the EWP program. ***Id.* at 119; Deposition Exhibit 1, *attached to* Crandall Deposition.** As a result, Greene was removed from his positions as conservationist and the EWP government representative in Graham and Cherokee counties. **Crandall Deposition, *supra*.** Tew became the new government representative. **Attachment F, Deposition of Howard Tew, Vol. 2, *attached to* Graham County Defendants' Motion, at 84.** At the same time, Timpson was removed from his role as the EWP government inspector in Graham and Cherokee counties. **Crandall Deposition, *supra*.** Levourn Wiggins replaced Timpson as the government inspector in March 1996. **Attachment J, Deposition of James Levourn Wiggins, *attached to* Graham County Defendants' Motion, at 18.**

Howard Tew, who was Crandall's engineer, explained how the NRCS worked with the local soil and water conservation districts after a natural

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[12]Defendant William Timpson (Timpson) worked as a soil conservationist under Greene's supervision. **Attachment C, Greene Deposition, *attached to* Graham County Defendants' Motion, at 34; 156.** Timpson was an employee of NCRS. ***Id.***

disaster occurred and participation in an EWP program had been approved.

> [L]et me give you an example of an equipment rental job. Equipment rental, historically again would be used especially if we had debris removal, where we had a storm. Whether it was a significant – trees that were down in the stream, maybe there were rock piles that were piled up. And time just did not allow us to go out and survey, draw up specific plans that told the contractor that there was 360 cubic yards of rock that had to be removed and piled in a certain place. There was not time to do that because there were so many sites and it was a short time fuse to get the work done. So what we elected to do is specify the equipment that we knew could do the job, based on our prior experience; specify the equipment that we felt could do the work. Then we would have specifications that required the successful contractor to provide equipment that met those specifications, and operators that met those specifications. And then once we had a

> contract, had a contract to provide us the equipment we wanted, he would deliver the equipment to the site with an operator. And we would physically tell him . . . what to do. We would direct work at the site under the equipment rental.
>
> . . .
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> For instance, working with a county, and with the county commissioners, they may have a maintenance staff, a maintenance crew that they can actually use to take equipment, and go in and remove stumps, remove trees, cut trees and take them to the landfill. But they're doing it with their own forces. Sometimes that has been stretched perhaps a little bit where maybe they didn't have as many of their own forces as they needed to do it, and they'd go out and hire some extra people and put them on to do that. But they would still do it with their own forces rather than contracting out to a separate contractor.

Attachment B, Deposition of Howard Tew, Vol. 1, *attached to* Graham County Defendants' Motion, at 22-24. In fact, Tew testified that "[t]he whole

purpose of the performance of work agreement is to allow the sponsoring entity to do the work with their own forces." **Attachment F, Tew Deposition, Vol. 2, *attached to* Graham County Defendants' Motion, at 31.** That was not unusual, according to Tew. ***Id.***

Tew testified that when he learned that Orr was doing the actual work on the Graham County 650 project, there was discussion as to whether this amounted to a conflict of interest. ***Id.* at 36.** He testified that as long as the Graham County Soil & Water Conservation District did not pay Orr two salaries, one for his regular job and another for doing the project work during the time that he would normally be employed with the District, there was no problem. ***Id.*** He came to the conclusion that allowing Orr to do the work was permissible under the terms of the agreement between NRCS and Graham County as well as under the terms of the performance of work agreement between Graham County and the Graham County Soil & Water Conservation District. ***Id.* at 36-37.** In fact, under the terms of the "code of conduct" which was provided as a prerequisite to the EWP program, Orr was not prohibited from doing the work. ***Id.* at 37.** Tew also testified that bidding was not required under a performance of work agreement. ***Id.* at 39.**

In April 1996, Tew received a telephone call from Donna Moffitt who was performing an accounting audit for the Graham County Soil & Water Conservation District. **Exhibit 5, Excerpts from Tew Deposition, *attached to* Graham District Defendants' Motion, at Deposition Exhibit 14.** Moffitt advised Tew that the District had filter fabric left over from the EWP-216 project and the District was selling the fabric to farmers for use in state agricultural conservation programs. ***Id.*** Tew investigated this remark and noted in a letter to his superior, Dennis Berkstresser, that it appeared the District had purchased the fabric prior to the time it was actually to have been installed. ***Id.*** Thus, the government had paid for the fabric before its actual installation. "Normal practice would be to pay the 65 cents cost of materials but not the full $2.00 installation cost until the material was properly installed and inspected. While such reporting could hardly be considered fraud it was nevertheless mishandled if not intentionally misleading." ***Id.*** Tew further noted that his predecessor, Greene, had previously certified payment for this fabric. ***Id.*** Tew, therefore, advised Berkstresser as well as Crandall of the situation. ***Id.*** Tew testified there was a discrepancy of $3,700 for which Graham County should reimburse the government. Tew Deposition, supra, at 70. However, he left how to handle this discrepancy to

Elizabeth Caldwell and Dennis Berkstresser, who were NRCS employees in supervisory positions over him. ***Id.*** In July 1996, the final payment was made to Orr.

Orr performed the work in stages. He presented a bill to the Graham County Soil & Water Conservation District when one stage of the work was completed. The District, upon approval and payment of the bill, would then submit that bill to the County for reimbursement. The County would then reimburse the District through EWP funds. **Caldwell Declaration, *supra*.** In connection with a portion of the re-seeding project, the County overpaid Orr for his work; however, this was discovered by the County during an audit. [13] **Attachment F, Tew Deposition, Vol. 2, *attached to* Graham County Defendants' Motion, at 89.** The

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[13]Defendant Dale Wiggins (Wiggins) testified during his deposition that when a question arose as to one payment, he reviewed the reimbursement request and found "that some of the actual seeding square footage that had been requested for payment was greater than what had actually been done. So we made an adjustment according to that." **Attachment E, Deposition of Dale Wiggins, Vol. 1, *attached to* Graham County Defendants' Motion, at 45.** Keith Orr, the contractor who was involved, never actually received an overpayment because the error was caught on the request for reimbursement. ***Id.***

County advised the NRCS of the overpayment and in no manner attempted to hide this error. ***Id.*** In order for the County to receive payment under the EWP program, Tew, as the government representative who succeeded Greene, would complete the reimbursement request forms. ***Id.* at 114-15.** The information which Tew would include on those forms usually came from job diaries and included measurements taken by the inspectors in the field, invoices, receipts and notes in the field books. ***Id.* at 115.** At times, he would make a visual inspection in the field in order to obtain the information. ***Id.* at 116.**

Elizabeth Caldwell was employed by the United States Department of Agriculture in 1995 as a contracting officer for the NRCS. **Caldwell Declaration, *supra*, ¶ 2.** She was in charge of assisting the local county agency in connection with the EWP project agreement between the NRCS and Graham County in 1995. ***Id.* ¶ 4.** Project Agreement 69-4532-5-650 was a performance of work agreement. ***Id.* ¶ 7.** NRCS regulations permit a county in connection with such an agreement to perform the work with its own employees or to enter into an arrangement with the local soil and water conservation district to perform the work. ***Id.* ¶ 8.** Thus, it was acceptable for Graham County to allow the Graham County Soil & Water Conservation District to perform the work and neither entity was required to bid any

work done by sub-contractors. ***Id.*** **¶ 9.** In order to be reimbursed, the County was required to submit forms which were completed by the NRCS government representative, in this case Greene and then Tew. ***Id.*** **¶ 10.** On those forms, the representative would summarize the requested cost of the project and sign a certification that the work had been inspected by him or her, had been done in accordance with the agreement, the quantities were correct, and the work for the relevant time period had not been previously reported. ***Id.*** **¶ 14.** Caldwell actually approved the payments submitted by Graham County and, as a result of her recommendations, the County was reimbursed. ***Id.*** **¶¶ 16-18.**

> In my experience with EWP contracts as an NRCS employee, the local contracting official who submitted the SF-270's, Dale Wiggins, would be presented with Forms AS-49A & B by the Government Representative [Greene and/or Tew] prior to signing the SF-270. It is reasonable for the local contracting official [Wiggins] to sign the SF-270 when presented with Forms AS-49 A & B if Forms AS-49 A

> and B correspond to the amount requested in the SF-270.[14]

***Id.* ¶ 19 (footnote added).**

Dale Wiggins was the Graham County manager during this time period and he was the contracting officer for the EWP-216 program between the NRCS and Graham County.[15] **Exhibit 1, Excerpts of Deposition of Dale Wiggins, *attached to* Graham District Defendants' Motion, at 5-6, 59, 81-82.** Because Orr was an employee of the Graham County Soil & Water Conservation District and not the County, Wiggins did not feel that it was a violation of the code of conduct for Orr to do contractual work after

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[14]This opinion was reiterated by Levourn Wiggins who ultimately took over Timpson's job as government inspector. **Attachment J, James Levourn Wiggins Deposition, *attached to* Graham County Defendants' Motion, at 47.**

[15]Defendant Raymond Williams (Williams) was appointed as the alternate contracting officer for the EWP project. **Attachment E, Wiggins Deposition, *supra*, at 74.**

his normal duties.[16] **Attachment G, Wiggins Deposition, Vol. 1, *attached to* Graham County Defendants' Reply to Plaintiff's Opposition to its Motion for Summary Judgment, at 94.** In order for Graham County to be reimbursed from the EWP-216 program, Greene, as the government representative, would first complete the federal form, certifying the amount owed to Graham County and then present it to Wiggins. ***Id.* at 94-96; Exhibit 5, Excerpts from Tew Deposition, *attached to* Graham District Defendants' Motion, at 21 ("Well, as government representative, Richard [Greene] would have . . . been responsible for actually preparing the pay estimates and certifying them.").** At an undisclosed point in time, Wilson made allegations against Orr and, as a result, Wiggins consulted the county attorney before making any more payments to Orr for services rendered. **Attachment F, Wiggins Deposition, Vol. 2, *attached to* Graham County Defendants' Reply to Plaintiff's Opposition to its Motion for Summary Judgment, at 32.** "The consultation with the attorney was one question: 'Do we have a right' – 'as county commissioners, do we have a right to withhold a payment approved by the

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[16]Greene also testified that Orr was an employee of the Graham County Soil & Water Conservation District, not the County. **Attachment C, Greene Deposition, *supra*, at 34.**

Graham County Soil & Water Conservation District . . . based on an allegation of some improper conduct or contract?' And his answer back to me was, 'No, you don't.'" ***Id.* at 32-33.** Concerning the conflict of interest issue, Dale Wiggins testified that the code of conduct applied to any employee of Graham County, the agency which had contracted with NRCS, but it did not apply to an employee of the Graham County Soil & Water Conservation District. **Attachment G, Wiggins Deposition, *supra*, at 95.**

In December 1995, after Crandall terminated Greene as district conservationist, Levourn Wiggins was assigned that position on a temporary basis. **Attachment J, James Levourn Wiggins Deposition, *supra*, at 18.** Levourn Wiggins was told by Crandall that the NRCS was investigating some charges which had been made against Greene; thus, Wiggins should cover the conservationist responsibilities until the matter had been concluded. ***Id.* at 20.** After being assigned the job of construction inspector for the EWP work done in Graham County, Levourn Wiggins wrote to Tew with his recommendations as to what should be paid on the project. ***Id.* at 26.** Tew asked Levourn Wiggins to make a personal inspection of the re-seeding work done by Orr. ***Id. at 28-29.*** There were two problems with the re-seeding done by Orr; first, Orr overcharged

for re-seeding that was not actually done, and second, the re-seeding work was never done for two individuals. ***Id.*, at 54-55.** Levourn Wiggins attended a meeting in June 1996 for the Graham Soil & Water Conservation District at which time the discrepancies in the re-seeding job were discussed. ***Id.* at 57, 59.** Dale Wiggins, who was the county manager, refused to sign off on the payment to Orr because of the discrepancies. ***Id.* at 59-60, 93.**

On November 14, 1996, Levourn Wiggins, in his capacity as government inspector, wrote to Tew, in his capacity as the government representative, for the EWP-216 project and made the following observations:

> The following is submitted to you as information you can use to process the final payment for the Performance of Work for agreement #69-4532-5-650, to the Graham County Commissioners. I am in no way verifying that all the work reported prior to the time that I was assigned Construction Inspector, was done as reported. The facts point out that there are several discrepancies in what was reported and what was actually done, and/or what materials were used. Existing records that I have access to

indicate the following information is accurate.

Seeding:

Keith Orr's last bill to the Graham County [Soil & Water Conservation District] for seeding and mulching was for 105,000 sq. ft. at $27 per 1000 ft., for a total of $2835.00. Graham County found errors in the bills Keith Orr turned in. Keith had charged for $631.26 too much on his bills. This means there was 23,380 sq. ft. of seeding turned in that was not done. The county also subtracted $241.50 from Keith Orr's bill because some landowners said that either no seeding was done on their property, or they did it themselves. There are other landowners who have indicated inconsistences in the amount of seeding done on their property and/or the materials used. This is an additional 8944 sq. ft. of seeding not done for a total of 32,324 sq. ft. of seeding that was turned into NRCS as being completed, but actually was not done.

. . .

> Driving Cap:
>
> Very strong evidence exists that a driving cap for Graham County never existed. The [Soil & Water Conservation District] board asked Keith Orr to refund the money he was paid for this item. Keith has not paid back this money and the matter has been turned over to the NC Attorney Generals Office.
>
> . . .
>
> Filter cloth:
>
> The Graham County [Soil & Water Conservation District] bought 6 rolls of filter cloth on 7-28-95. . . . [It appears] that only 500 sq. yds. (1 roll) of filter cloth was used on the cribbing project instead of 2500 sq. yds. (5 rolls).

Exhibit 2, *attached to* James Levourn Wiggins Deposition, *supra*. The letter also contains verification and certification by Levourn Wiggins of other work which he inspected and which had been properly performed. ***Id.***

Tew prepared the final construction payment estimate, Form 49-B, and certified it for payment. **Attachment F, Tew Deposition, Vol. 2, at 68.** For purposes of the final payment, Tew deducted the above

work from the final payment. ***Id.* at 68-69.** The amount deducted represented re-seeding which was not done according to the project specifications, filter fabric which was not installed, and a driving cap which was not put in place by Orr. ***Id.*** This was work which Tew refused to certify as having been properly performed under the agreement. ***Id.*** As a result, this amount was deducted from the total payment. ***Id.***

Keith Orr testified that as an employee of the Graham County Soil & Water Conservation District, his job was to supervise the removal of the logs on the EWP 650 project. **Attachment H, Deposition of Keith Orr, *attached to* Graham County Defendants' Motion, at 39.** In his time off from that job, he did the re-seeding job and built the crib. ***Id.* at 39-40.** He did not do either of those jobs during his regular working hours for the District but on his own time, after work or at some time when he was not performing his regular job. ***Id.*** There were two individuals who complained about the seeding job he performed. ***Id.* at 189.** One of those individuals was the father of Karen Wilson, the Relator herein. ***Id.*** Orr was never paid by the District or the County for the work done for either of those individuals. ***Id.***

Wilson worked during the time at issue as a part-time secretary for the Graham County Soil &

Water Conservation District. It was her understanding that during a meeting of the Graham County Board of Commissioners, at an undisclosed time, Orr was appointed to act as an equipment and construction inspector for the EWP project. **Attachment D, Deposition of Karen Wilson, Vol. 1, *attached to* Graham County Defendants' Motion, at 194.** She testified that one way in which Orr made false claims included billing for 100,000 square feet of seeding when he actually only did 81,000 square feet of seeding. ***Id.* at 204.** Other examples of his submitting false claims involved the facts that he did not bid on the contract and he did not provide insurance. ***Id.*** Wilson also corrected her testimony to state that the square footage computations for seeding did not amount to a false claim by Orr. ***Id.*** The false claims she stated, were the facts that Orr was an employee of the district, he did not bid the contract, and no inspection of the seeding was done. ***Id.* at 205.** Wilson then modified her testimony again to state that submitting a bill for 100,000 square feet of seeding when only 81,000 square feet were seeded constituted a false claim. ***Id.***

During her second deposition, Wilson testified that she had been appointed by the District as an inspector but she never received a letter from the NRCS appointing her as the inspector on the project.

Attachment I, Wilson Deposition, Vol. 2, *attached to* Graham County Defendants' Motion, at 11. Wilson did not know if anyone other than herself had voiced concern over whether or not Orr was allowed to do the work on the EWP project. ***Id.* at 15.** She could not remember whether she advised the Board of her opinion before or after Orr began doing the work. ***Id.*** Wilson concluded that Orr could not do this work because he was an employee of the Graham County Soil & Water Conservation District. ***Id.* at 16.** And, due to the fact he was a District employee, she concluded, he violated the code of conduct. ***Id.*** In reaching this conclusion, she contacted Milton Heath at the Institute of Government by whom she was told to consult the rules and regulations which were in writing. ***Id.*** Wilson admitted that Heath did not give her an opinion as to whether Orr's conduct violated the code of conduct. ***Id.*** Wilson alleged that Tew told the Board that the work on this project had to be put out for bid, but she could not answer whether she was present at that conversation. ***Id.* at 42.** Wilson answered only that the necessity for bidding was discussed. ***Id.*** Wilson testified that Crandall never told the Board that the work had to be put out for bid and she could not recall if anyone else so advised the Board in her presence. ***Id.*** She could not recall if she was present at any time when Tew told the Board that

Orr was not eligible to do the work because he was an employee or for any other reason. ***Id.***

At an undisclosed time prior to December 1995, Wilson told Dale Wiggins that there was a problem with the EWP projects. **Attachment C, Wilson Deposition, Vol. 2, *attached to*, Graham County Defendants' Reply to Plaintiff's Opposition, at 125-26.** Wilson acknowledged that the minutes of the Graham County Soil & Water Conservation District do not reflect that at any point in 1995 did Wilson inform Wiggins of those problems. ***Id.* at 129.** Wilson also testified that at some point between March and June of 1995, she told Dale Wiggins and the Soil & Water Conservation District Supervisors that Orr had stated he was going to do the EWP project work and then split the proceeds. **Attachment D, Wilson Deposition, *attached to* Graham County Defendants' Reply to Plaintiff's Opposition, at 125-26.** When asked to specify what she told the Supervisors, Wilson responded, "I'm not sure. To some degree I'm sure I told them about it. But I don't know that I specifically verbatim told them exactly that." ***Id.* at 126.** Subsequent to her deposition testimony, Wilson provided an affidavit in opposition to the Defendants' motions for summary judgment in which she averred:

> I am stating that when I approached Dale Wiggins Graham County Manager and Commissioner during 1995 with concerns of wrongdoing in the Graham County [Soil & Water Conservation District] I did tell him about the illegal sales of filter fabric by NRCS employee Richard Greene thru his wife Cherie Greenes (sic) beauty shop "Fantasia." Therefore stating that he was made aware of the illegal activities being conducted at the time.

Declaration of Karen Wilson, *attached to* Relator's Opposition to Graham County's Motion for Summary Judgment, filed December 18, 2006, ¶ 4. The Court does not find this affidavit, provided after the deposition, constitutes admissible evidence. ***Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 186 n.7 (4th Cir. 2001) (citing *Rohrbough v. Wyeth Labs., Inc.*, 916 F.2d 970 (4th Cir. 1990) ("[A] party against whom summary judgment is sought cannot create a jury issue by identifying discrepancies in his own account of the facts."));** ***Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 438 (4th Cir. 1999).** Moreover, the allegations concerning the sale of filter cloth through

the business of Greene's wife are beyond the scope of this complaint.

With respect to the allegations of a conspiracy, Wilson testified that she could not recall if Orr spoke about Billy Brown as being involved. **Attachment E, Wilson Deposition, *attached to* Realtor's Opposition to Graham County Defendants' Motion, at 123 ("I'm not sure if he talked about Billy Brown or not.").** Concerning Timpson's alleged role in the conspiracy, Wilson alleged that Orr said they were splitting the money but she did not hear Timpson say this and she did not see Timpson receive any money. ***Id.* at 124.** Wilson also alleged that she told federal NRCS employees Cecil Settle and Michelle Wilson about this conversation. ***Id.* at 125-26.**

Wilson testified that Dale Wiggins submitted a false claim by certifying that the EWP project had been completed in accordance with the project agreement. **Attachment K, Wilson Deposition, Vol. 3, *attached to* Graham County Defendants' Motion, at 9.** When asked if she had any evidence that his conduct was anything other than negligent, Wilson was unable to specify such evidence. ***Id.* at 20-21.** She stated that the "[b]ottom line" was that there were problems with the bill for the work done. ***Id. at 21.*** When she complained, both Dale Wiggins and Kim

Crisp performed an audit on Orr's bills. ***Id.*** And, Wilson admitted that Orr was not paid the entire amount for which he submitted a bill. ***Id.*** **at 23.** Despite her allegations that the county commissioners were paid out of federal funds, Wilson also admitted that she had no knowledge that any county commissioner personally received funds through the EWP 216 project.[17] **Attachment E, Wilson Deposition, Vol. 3, *attached to* Graham County Defendants' Reply to Plaintiff's Opposition, at 49.**

Wilson provided a statement to Kenneth Golec, a Special Agent with the Office of Inspector General (OIG) of the United States Department of Agriculture,

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[17]Although not clear, it appears that Wilson believed the county commissioners were paying themselves a "kickback."

on November 14, 1996.[18] In that statement, Wilson makes the following allegations:

1. From January 1993 through December 1995, the Graham County Soil & Water Conservation District agreed to allow Greene, who was employed by the NRCS, to handle the day-to-day supervision of the Graham County Soil & Water Conservation District. **Attachment B, to Relator's Opposition to Graham County Defendants' Motion, at 1.** Wilson's statement reiterates the testimony of county employees that Greene provided guidance and direction in connection with the EWP-216 projects.

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[18]During her deposition, Wilson testified that the statement was "a prepared statement" which she signed. **Attachment C, Wilson Deposition, *attached to* Realtor's Opposition to Graham County Defendants' Motion, at 74.** When asked if she would certify that everything in the statement was true, Wilson responded, "To the best of my knowledge and belief," at the time. ***Id.* at 75.** Subsequently, by virtue of her declaration, Wilson attempted to bootstrap that "[t]he facts that I asserted in that statement were true and correct." **Wilson Declaration, *supra*, ¶ 1.** The Court does not weigh credibility in connection with a motion for summary judgment, however, such inconsistencies to merit mention.

2. In early 1993, residents of Graham County would drop off checks at the District's office made out to a company known as "Fantasia" in order to purchase filter fabric cloth for use in soil conservation. ***Id.*** This fabric was used by farmers in soil conservation plans under the North Carolina Agriculture Cost Share Program. ***Id.*** Wilson "believe[d]" that Greene would share the money paid for fabric with Orr and Timpson. ***Id.*** This stopped in early 1995. ***Id.* at 2.** These allegations fall beyond the scope of the complaint. Nor do they implicate the federal program on which the False Claims Act cause of action is based, that is, the EWP 216 agreement and the 630 and 650 projects.

3. In 1993, 1994 and 1995, funds were allocated by the North Carolina Agriculture Cost Share Program for an entity known as "G&L Farms." ***Id.*** Wilson "believe[d]" that this farm was a partnership between Greene and his wife and another couple. ***Id.*** The North Carolina program issued checks to that entity in 1993 and 1994 but not in 1995. ***Id.*** Wilson makes additional allegations against Greene based on things allegedly said by other individuals. These allegations are hearsay which may not be considered as evidence. **Fed. R. Evid. 801.** Despite these allegations, Wilson acknowledged that no funds were paid to G&L Farm in 1995. Moreover, these allegations go beyond the complaint and the False Claims Act cause of action

which is the subject of this lawsuit, that is, the EWP 216 agreement and the 630 and 650 projects.

4. Although Wilson's position was that of a part-time secretary, she alleged that she and Bruce Lewis, the District's chairman, determined that Greene was acting inappropriately and she "decided" that Greene had not corrected his behavior "between May and December of 1995." **Attachment B, *supra*, at 3.** As a result, she alleged that "we" first notified the NRCS "of our problems" in October 1995 and a letter was sent to the NRCS in December 1995. ***Id.*** A copy of the letter is not attached to the affidavit. These allegations conflict with Wilson's deposition testimony that she first alerted Cecil Settle, Michelle Wilson and Dale Wiggins in June 1996. **Attachment E, Wilson Deposition, *attached to* Realtor's Opposition to Graham County Defendants' Motion, at 125.**

5. Wilson alleges that two days after Crandall removed Greene from his position, the files "pertaining to G&L Farms were missing from the office." **Attachment B, *supra*.** Wilson again makes inadmissible hearsay allegations concerning what she was told by Orr. ***Id.*** **("Orr told me that Richard Greene had told him . . . .").** Moreover, as previously noted, these allegations are outside the scope of the complaint and the False Claims Act cause

of action which is the subject of this lawsuit, that is, the EWP 216 agreement and the 630 and 650 projects.

6. Wilson next alleges that Greene did not explain to the Graham County Soil & Water Conservation District board what the procedure was for bidding out contracts for the EWP projects. ***Id.* at 4.** It is not shown in what manner she would have known whether Greene did so. She alleges that no bids were taken. ***Id.***

7. Wilson alleges that when she received an invoice from Orr in June 1995, she told Greene that she could not pay Orr because he had a conflict of interest. ***Id.*** No allegation is made that Wilson had the authority to make that determination on her own. Nor is any evidence submitted to show that Wilson would have had such authority.

8. Wilson alleged that no contract existed for the work which Orr did until December 1995 at which time a contract "showed up at the county manager's office." ***Id.* at 5.** Wilson alleges that she "was told" that Orr produced the contract to Wiggins shortly before that time. ***Id.*** Again, this is hearsay evidence which is inadmissible. **Fed. R. Evid. 801.**

9. Wilson also makes an allegation, based on hearsay, that Greene and Orr attempted to force Sharon Crisp to "tear up" the billing paperwork. **Attachment B, *supra*; *Noviello v. City of Boston*, 398 F.3d 76, 85 (1st Cir. 2005) (Portions of a party's affidavit which recount inadmissible hearsay are incompetent to withstand summary judgment.).**

10. Wilson alleges that Greene "would help" Orr with preparing his invoices for the seeding work. **Attachment B, *supra*.** According to Elizabeth Caldwell, this would have been part of Greene's job as the government representative. **Caldwell Declaration, *supra*.**

11. Other inadmissible allegations of impropriety by Greene and Orr are based on "information" Wilson "found out . . . from talking with Clay County SWCD employees." **Attachment B, *supra*.** Wilson alleges that other persons told her things about Greene and Orr; what others say is inadmissible hearsay.

12. Wilson alleges that Orr did the seeding work "while on official duty" for the Graham County Soil & Water Conservation District. ***Id.*** No documentary evidence in support of this allegation is attached to the affidavit.

13. Wilson acknowledges that she was not asked to inspect Orr's work. ***Id.*** She admits that Greene approved the payment of Orr's invoices for work done. ***Id.***

14. Wilson alleges that Orr told her that he and Greene were splitting the money paid to Orr for the EWP seeding project. ***Id.* at 6.** Wilson also alleged that Orr told her he had been "cut out" of the EWP project in Cherokee County and replaced by Billy Brown. ***Id.*** She then alleged that Orr told her he had voluntarily given that job to Brown because questions were being asked about Orr and Greene. ***Id.***

15. Wilson saw Billy Brown's wife come into the office and go into Greene's office on October 19, 1995. ***Id.*** She alleged a hearsay conversation which she overheard between Mrs. Brown and Greene. ***Id.*** The conversation is inadmissible. **Fed. R. Evid. 801.**

16. Wilson alleged that she paid an invoice submitted by P&S Rock Corporation. **Attachment B, *supra*.** She alleged another hearsay conversation involving that corporation. **Fed. R. Evid. 801.**

17. Wilson alleged that Greene told her the trees along the river beds that had fallen after the flood and were to have been used in cribbing structures had been

stolen. **Attachment B, *supra*.** Wilson then alleged that Orr told her Greene had stolen the logs and sold them. ***Id.***

During one of her depositions, Wilson testified that she felt slighted by her supervisors because she did not get flowers for secretary's day. **Attachment E, Wilson Deposition, *attached to* Relator's Opposition to Graham County Defendants' Motion, at 121.** Wilson also testified that Orr told her he was going to split money with Greene and Timpson but she never saw any money change hands. ***Id.* at 124.** As to Timpson, Wilson testified that "apparently" he sold logs. ***Id.*** Wilson also testified that Orr told her that he, Greene and Timpson were going to contribute money to a fund to buy materials, they would then do the work on the project and would split the money from the 650 project. ***Id.* at 124-25.** Although Wilson testified that she had told Dale Wiggins, the District board and other employees of this, she later testified that she was not sure but "to some degree I'm sure I told them about it." ***Id.*, at 126.**

In March 1996, an Agreed Upon Procedures Report[19] for Graham County was performed by Crisp

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[19]An "agreed upon procedures report" is an informal audit which provides answers to specific questions concerning financial records and issues. ***In re***

Hughes & Co., LLP, for the period March 27 through November 8, 1995. **Attachment M, Declaration of Sharon Holloway (nee Crisp) and attached Agreed Upon Procedures Report, dated March 13, 1996, *attached to* Relator's Opposition to Graham County Defendants' Motion.** According to the report, the procedures were performed to determine that "the books and records of Graham County have been adequately maintained." ***Id.*** The report included the following comments:

> It was noted that contract terms [for the 650 project] relating to cost of rip-rap, area to be seeded, cribbing assembly, and specification of the organization to perform the actual work as specified in the original project agreements for [the 650 contract] obtained in the Graham County files did not agree to the copy obtained from the USDA NRCS Waynesville District office.
>
> . . .
>
> We noted several instances where invoices submitted to the County for payment were extended incorrectly,

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***Holcomb Health Care Servs., LLC*, 329 B.R. 622, 666 (Bankr. M.D. Tenn. 2004).**

> causing the County to pay more than the invoice details supported.
>
> . . .
>
> Requests for reimbursement were not supported by invoices or other documentation dated prior to the date of the reimbursement request.
>
> . . .
>
> Certain portions of the [650] project were completed by an individual who was an approved project inspector. This appears to be a violation of the County's code of conduct which was submitted in certifications as prerequisite to establishing project agreements with the USDA.
>
> [N.C.]G.S. 143-131 requires contracts for construction or repairs costing from $5,000 to $50,000 be awarded in accordance with an informal bidding process. The statute requires that a record of all such bids be kept. No documentation was available to indicate that informal bid requirements had been complied with.

Id. Although mailed to Sharon Crisp, who at the time was the finance officer for Graham County, the report was addressed to the Graham County Board of Commissioners. **Holloway (nee Crisp) Declaration, *supra*, ¶ 1.** As a result of this report, Crisp was concerned that payments should not be made to Orr in connection with the 650 EWP project. ***Id.* ¶ 5.** When Dale Wiggins asked her to issue a check to Orr, she included a statement on the check that she was issuing it under duress. ***Id.* ¶ 6.** Crisp also alleged in the affidavit that at one point during 1995, Greene and Orr asked her to destroy some documents relating to EWP payments. ***Id.* ¶ 7.** Crisp refused to do so. ***Id.***

V. THE JURISDICTIONAL BAR

The audit report issued to the Graham County Board of Commissioners in March 1996 was an administrative audit by a local state entity which was publicly disclosed when sent to the Board. ***Bly-Magee*, 470 F.3d at 917-18; *Battle v. Bd. of Regents for Georgia*, 468 F.3d 755 (11th Cir. 2006).** That report contained allegations of several improprieties in the administration of the EWP 650 project, including the facts that Orr was improperly performing the work due to his status as an inspector and no bidding quotes for the contract were contained within the file. "Public disclosure" occurs "when the critical elements exposing

the transaction as fraudulent are placed in the public domain." ***United States ex rel. Feingold v. AdminaStar Federal, Inc.*., 324 F.3d 492, 495 (7th Cir. 2003).** Thus, to the extent that any allegations of the complaint overlap this information, the jurisdictional bar would apply unless Wilson shows by a preponderance of the evidence that she was an original source of the information upon which these statements were based. ***Bly-Magee*, 470 F.3d at 917-18.** "Although Plaintiff need not trace the flow of information from herself to the [auditor] to the . . . audit report[,] summary judgment [will] be proper [if] Plaintiff fail[s] to provide the district court with specific facts showing that she had direct and independent knowledge of the audit findings on which she bases her FCA claims." ***Battle*, 468 F.3d at 762-63.**

Sharon Crisp averred that at the time she received the audit report, she had previous conversations with Wilson. **Holloway (nee Crisp) Declaration, *supra*.** Wilson has not refuted that this became publicly disclosed; indeed, she has relied on this document. ***Id.*** Wilson's statement to Agent Golec was not provided until November 1996, after the time of this audit. In short, Wilson has failed to prove by a preponderance of the evidence that she acquired this knowledge without the intervening agency of the audit sent to Crisp.

Grayson, supra; Bly-Magee, supra. The Court finds the jurisdictional bar applies to the claims that Orr's alleged status as an inspector was a conflict of interest and that the local county agencies failed to entertain bids for his work.

By May 1996, the North Carolina Department of Environment, Health and Natural Resources had issued a comprehensive report concerning the North Carolina Agricultural Cost Sharing Program and the involvement of Greene, Timpson, Billy Brown, Charles Lane, Cheryl Lane and G&L Farms with improprieties in connection with that program. **Report of Investigation, U.S. Department of Agriculture, *attached to* Affidavit of Alicia Shelton, *attached to* Cherokee SWCD Defendants' Reply in Support of Motion for Summary Judgment, at 1-2.** This investigation by a state agency obviously falls within the "administrative investigation" source of the False Claims Act statute. "Administrative reports are publicly disclosed because, by their very nature, they establish the relevant agency's awareness of the information in those reports." ***Feingold, supra*, at 496.** The allegations which Wilson made in her statement to Special Agent Golec in November 1996 were the subject of that prior report. **Report of Investigation, *supra*.** As a result, the jurisdictional bar applies inasmuch as Wilson has not shown that

she was an original source. ***Grayson, supra; Bly-Magee, supra.*** Moreover, as previously noted, these allegations are outside the scope of the complaint.

In addition to the report made by the State of North Carolina, the Office of Inspector General ("OIG") of the U.S. Department of Agriculture also prepared a report dated August 13, 1997, which contained the findings from an investigation which encompassed the same time period as involved in this action. **Report of Investigation, *supra***. The report, prepared by Special Agent Golec, identifies 33 separate individuals in addition to Wilson as sources of information. ***Id.*** The information provided by Wilson, by comparison to other sources, is diminutive and non-existent as to some of the issues investigated. For example, Wilson was not listed by Agent Golec as a source for information concerning the sale of timber taken from the EWP-216 sites. Chad Decker, a soil technician with the Cherokee County Soil & Water Conservation District, told Golec that Greene instructed him to haul the fallen timber from the 1995 Cherokee County EWP-216 site to Valwood Corporation (Valwood) and to have Valwood make the checks for the value of the timber payable to Greene. ***Id.*** **at 4.** Golec's investigation of the EWP job diary kept by the federal NRCS employees corroborated Decker's statement; in

fact, Timpson signed that diary page as the federal inspector. ***Id.*** Decker stated Greene continued this pattern throughout 1995. ***Id.*, at 5.** The same information was received from Jerry Ware, another Cherokee County employee. ***Id.*** Golec's investigation uncovered checks from Valwood which produced a schedule of checks issued to Greene totaling $2,254.88. ***Id.*** Other sources noted by Agent Golec include Richard Honeycutt, the county manager for Cherokee County; Mike Hawk, former chairmen of the Cherokee County Soil & Water Conservation District; Steve Jordan, businessman; Randy Wiggins, finance officer for Cherokee County; and Richard Greene. ***Id.* at 1-7.** Wilson has alleged a claim in her complaint based on the alleged illegal timber sales. Golec's report discloses numerous sources for this information; however, Wilson is not one of them. ***United States v. Catholic Healthcare West*, 445 F.3d 1147, 1151 (9th Cir.), *cert. denied*, 127 S. Ct. 725 (2006) (Public disclosure triggering the statute's bar does not have to occur from a single source but can occur from multiple sources.); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Life Ins. Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1991) (The statute is designed to "preclude qui tam suits based on information that would have been equally available to strangers to the fraud transaction had they**

chosen to look for it as it was to the relator."). In other words, it appears to have been common knowledge that Greene engaged in this conduct. Wilson has not shown by a preponderance of the evidence that she was an original source of this information independent from the public disclosures by numerous other county employees. The jurisdictional bar applies to this portion of the complaint.

Mike Hawk gave a statement to Special Agent Golec advising that he had been involved with the Cherokee County Soil & Water Conservation District Board of Supervisors since 1994 but first learned of Greene's actions with regard to the sale of fallen timber in the summer of 1996. **Report of Investigation, *supra*, at 6.** Hawk stated that at a board meeting in December 1995, Greene reported that the District needed to purchase wood to complete the cribbing. ***Id.*** The Board approved the purchase of wood from Billy Brown; however, Brown did not want to supply the wood so they had to use an alternate source. ***Id.*, 6-7.** Agent Golec actually reviewed Cherokee County records to ascertain this was done. ***Id.*** Thus, Hawk became aware of these timber sales in the summer of 1996, prior to the point in time that Wilson gave her statement to Agent Golec. Wilson has failed to come forward with any admissible evidence that she advised any governmental entity that Greene

sold the timber at issue prior to the time of her statement to Golec. To the extent that this issue may have been raised in Wilson's complaint, the jurisdictional bar attaches.

Through interviews with Charles and Cheryl Lane, as well as other local residents, Agent Golec established that Greene had been involved in G&L Farms while a federal employee in violation of conflict of interest regulations. ***Id.*, at 7-10.** On more than one occasion, Greene used state funds to build fences for cattle owned by the farm. ***Id.*** Keith Orr assisted Greene in getting county inspections so that the state funding would be approved. ***Id.*, at 10-11.** The formation of G&L Farms was described in detail by Brenda Sharpe who worked for 27 years as the administrative assistant for the Graham County ASCS[20] office. ***Id.*, at 13-14.** Information received from Sharpe and Agent Golec's investigation covered the time period from 1992 through 1995. ***Id.*** Although the allegations of the complaint do not encompass these allegations, Wilson has referred to them in her declaration. However, the report prepared by the North Carolina agency as well as Golec's report both show public disclosure of these events as to which Wilson is not an original source.

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[20]This acronym is not defined in the record. It appears to refer to a local soil conservation service.

Golec's report also discussed at length the purchase by Greene through his wife's company of filter fabric. ***Id.* at 17-23.** Golec interviewed 17 individuals for information about this conduct, including Wilson who provided a small portion of the information. ***Id.* at 20.** These allegations are not included in the complaint but would be subject to the jurisdictional bar in any event.

Included in Agent Golec's report is a lengthy statement from Richard Greene dated October 10, 1996, a date prior in time to Wilson's statement. **Exhibit 7, Statement of H. Richard Greene, *attached to* Report of Investigation.** Greene provided a thorough statement about his involvement with the purchase of filter fabric, bonuses allegedly paid to county employees, Fantasia, a meeting of the Cherokee County Soil & Water Conservation District at which the sale of this fabric was disclosed, Crandall's instruction to Greene to immediately stop this sale, the involvement of Greene and his wife with a farm in partnership with Charles and Joyce Lane, the involvement of this farm with the NCACSP program, his failure to truthfully answer a question on a USDA form, the sale of timber from the EWP-216 site in Cherokee County, the issuance of checks to him from Valwood, and an admission that he removed a portion of the G&L Farms files from the Graham County Soil & Water Conservation District office in

December 1995. ***Id.* at 1-14.** Concerning the EWP-216 project in Graham County, Greene states that he had trouble finding anyone who wanted to do the re-seeding and cribbing. ***Id.* at 9.** Orr agreed to do it and Greene had the approval from the Graham County Soil & Water Conservation District prior to Orr's beginning work. ***Id.*** Greene inspected Orr's work. ***Id.*** Because the cribbing portion of the work involved a new procedure, both Timpson and Greene were involved for a few days in the construction. ***Id.***

Greene also stated that in connection with the Cherokee County EWP-216 project, the Cherokee County Soil & Water Conservation District did not know anyone who would do the seeding and cribbing so he suggested Billy Brown. ***Id.*** Brown was given the contract but he did not have a credit account at Wayne's Feed Store in Murphy so Greene allowed Brown to use his account at Wayne's to purchase supplies for the project. ***Id.*** Brown paid the bill at Wayne's Feed Store or he would give Greene cash to pay for the supplies. ***Id.*** Brown's wife brought cash to Greene on one occasion at his office at the District in order to pay for the supplies. ***Id.*** At one point, Brown's truck broke down during the project and Greene and Timpson helped haul supplies to the site. ***Id.*** Greene stated that he did not have a partnership

with Orr, Timpson and/or Brown and they did not share any profits from any EWP work projects. ***Id.***

Wilson's statement to Agent Golec was dated November 14, 1996, after Greene's statement. She reported that Orr advised her in August 1995 that Greene, Orr, Timpson and Brown were splitting the EWP-216 money in Cherokee County. **Report of Investigation, at 28.** Agent Golec reported that Brown, Timpson, Orr and Greene denied any such arrangement. ***Id.*, at 28-29.** While Greene's statement to Agent Golec was given prior to that of Wilson, the report does not disclose when Orr, Timpson and Brown gave their statements to Agent Golec. Golec investigated the allegations thoroughly, interviewed seven other individuals and conducted an independent investigation. ***Id.* at 28-30.** Agent Golec concluded that there was no evidence that these individuals split the proceeds from the EWP-216 funds. ***Id.* at 2.**

The concept of public disclosure means that sufficient information was previously disclosed so that the government was alerted to the notion that the defendants might be implicated in fraud. ***A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1243-44 (9th Cir. 2000); *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 332 (6th Cir. 1998).** The investigation by the United

States Department of Agriculture clearly qualifies under the statute as a fora of disclosure. ***Id.***; ***Catholic Healthcare West*, 445 F.3d at 1153 ("'[I]nvestigation' implies independent governmental leg-work."); *United States v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999) ("Disclosure of information to a competent public official about an alleged false claim against the government we hold to be public disclosure within the meaning of [the False Claims Act] when the disclosure is made to one who has managerial responsibility for the very claims being made.").** And, the disclosures made to Agent Golec by the various individuals both raised an inference of impropriety and encompassed every claim raised by Wilson in this lawsuit. ***Jones, supra*; *A-1, Ambulance, supra*.** To the extent that any allegations of the complaint might be considered to be part of the report, they have been publically disclosed and Wilson has not shown by a preponderance of the evidence that she is an original source. ***Bannon v. Edgewater Med. Cen.*, 406 F.Supp.2d 907 (N.D. Ill. 2005).** The jurisdictional bar, therefore, applies.[21]

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[21]Despite finding these claims barred, the Court has addresses them in an endeavor to achieve finality in this action.

VI. STANDARD OF REVIEW

> Under the Federal Rules of Civil Procedure, summary judgment shall be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As the Supreme Court has observed, "this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."

***Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 519 (4th Cir. 2003) (quoting Fed. R. Civ. P. 56(c) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)).** A genuine issue exists if a reasonable jury considering the evidence could return a verdict for the nonmoving party. ***Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994) (citing *Anderson*, *supra*).** "Regardless of whether he may ultimately be responsible for proof and persuasion, the

party seeking summary judgment bears an initial burden of demonstrating the absence of a genuine issue of material fact." ***Bouchat*, 346 F.3d at 522 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).** If this showing is made, the burden then shifts to the non-moving party who must convince the Court that a triable issue does exist. ***Id.***

> A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denial of [his] pleadings," but rather must "set forth specific facts showing that there is a genuine issue for trial." Furthermore, neither "[u]nsupported speculation," nor evidence that is "merely colorable" or "not significantly probative," will suffice to defeat a motion for summary judgment; rather, if the adverse party fails to bring forth facts showing that "reasonable minds could differ" on a material point, then, regardless of "[a]ny proof or evidentiary requirements imposed by the substantive law," "summary judgment, if appropriate, shall be entered."

***Id.* (quoting Fed. R. Civ. P. 56(e) and *Felty v. Graves-Humphreys Co.*, 818 F.3d 1126, 1128 (4th**

Cir. 1987)) (other internal citations omitted). Moreover, in considering the facts for the purposes of this motion, the Court will view the pleadings and material presented in the light most favorable to the nonmoving party. ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).**

A. The motion for summary judgment of Defendants Graham County, Raymond Williams, Dale Wiggins and Lynn Cody.

In response to the Graham County Defendants' motion for summary judgment, the Plaintiff has neither alleged nor shown any evidence that the handling of the 630 project agreement resulted in the submission or payment of a false claim. As a result, summary judgment is appropriate as to that agreement.

The complaint alleges that Raymond Williams and Lynn Cody were Graham County commissioners. However, in response to the motion for summary judgment, the Plaintiff has not made any allegations against these individuals. Assuming *arguendo* that the Plaintiff had accused these two of being involved in the conspiracy claim,[22] as discussed *infra*, that claim is

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[22]Nonetheless, it bears noting that Wilson's conspiracy allegations in the complaint do not

rejected. As a result, any such claim against Williams and Cody must also be rejected. Summary judgment in their favor is warranted.

As to the Defendant Graham County and its manager, Dale Wiggins, the Plaintiff claims there was a conspiracy among Greene, Orr and Timpson of which she advised Wiggins at an undisclosed point in1995. Wilson does not allege that Wiggins became a part of this conspiracy. The allegation is only that he was aware of the conspiracy and in his capacity as the county manager, submitted claims for reimbursement under the EWP 216 program. In other words, because Wiggins was aware of this conspiracy, his submission of claims to the NRCS for payment was false or fraudulent.

Of course, if Wilson has failed to prove the existence of the conspiracy, then Wiggins and Graham County are absolved of this accusation. The conspiracy is alleged to have involved the performance of the work on the 650 project in that Greene, Orr and Timpson agreed to split the EWP-216 program payment. The existence of this conspiracy depends on two sources: Wilson's deposition testimony and her statement made to Special Agent Golec in 1996.

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implicate these individuals.

First, as noted *infra*, Wilson's deposition testimony was that Orr told her that he, Greene and Timpson were going to split the EWP-216 money. But, she could not recall if Orr spoke about Billy Brown's involvement with the conspiracy.[23] Nor did she see money exchanged.

In the 1996 statement to Agent Golec, Wilson alleged that Orr told her about statements made by Greene, Timpson and Brown. As to Greene, Timpson, Brown and any defendant other than Orr, this is inadmissible hearsay. ***LaRou v. Ridlon*, 98 F.3d 659, 663 (1st Cir. 1996).** Wilson subsequently signed a declaration in which she attempted to bootstrap that statement by declaring it was true. Since Wilson submits this statement in opposition to summary judgment, it may not be considered as to any defendant other than Orr. ***Noviello*, 398 F.3d at 85 (Affidavit submitted by a party in opposition to summary judgment is incompetent if that party recounts inadmissible hearsay therein.).**

Nonetheless, assuming that such evidence is admissible and that Orr's alleged statement to Wilson

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[23]Brown was only involved in the Cherokee County project. Based on this admission, Brown's motion for summary judgment as to this issue will be granted for the reasons stated below.

was true, she has not presented any evidence that Greene and Timpson did any work on the 650 project, except work which they properly performed in their capacities as NRCS employees. Wilson also has not presented any admissible evidence that any one or more of the three men actually donated funds to a pool to purchase materials to use in performing the contract. Her evidence is limited to the statement attributed to Orr that the three men were going to do so. Nor has she presented any admissible evidence that Orr paid Greene or Timpson from the EWP funds received after submission of his bills. Although not clearly articulated, it may be that Wilson is alleging a conspiracy between Wiggins and Greene based solely on the fact that Wiggins submitted the payment forms after Greene's review thereof. This allegation, however, is refuted by the testimony of multiple NRCS employees who opined that it was entirely proper for Wiggins to rely on Greene's review and expertise. Moreover, it is compelling that Agent Golec concluded there was no agreement among the men. Based on the OIG investigation, Greene was subsequently indicted in federal court, tried and convicted for conduct disclosed in this report. However, Greene was not charged with conspiracy.

In response to a motion for summary judgment, the Plaintiff is obligated to come forward with admissible

evidence of a conspiracy to get a false or fraudulent claim paid and an act in furtherance of that conspiracy. ***United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 514 (3d Cir. 2007).** The evidence must show the existence of the alleged conspiracy; mere speculation by Wilson as to what the evidence shows is insufficient. ***United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 545 (7th Cir. 1999) (Relator "produced insufficient evidence of an agreement between FKW and Strange to show a conspiracy to defraud the government and accordingly granted FKW's motion for summary judgment on this count."); *Centennial LLC v. Becker*, 23 F. App'x 181 (4th Cir. 2002); *United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516 (9th Cir. 1999) (speculation and conjecture insufficient to make out a *prima facie* case).** Absent an affirmative agreement to defraud the United States, cooperation between Dale Wiggins and Greene in the administration of the requests for payment forms does not create a genuine issue of material fact as to an agreement by Wiggins to defraud the government. ***United States v. City of Houston*, 2006 WL 2382327 (S.D. Tex. 2006).**

Moreover, Wilson does not allege that Graham County and Dale Wiggins were members of such a conspiracy, only that she warned Wiggins of the

existence thereof. ***United States v. Murphy*, 937 F.2d 1032, 1037 (6th Cir. 1991).** Apparently, Wilson's claim is that by doing nothing to stop the conspiracy, Wiggins and Graham County became members of the conspiracy. The Court is required to look to the specific conduct of Graham County and Dale Wiggins and Wilson is required to show that each of them was a member of the alleged conspiracy. ***Id.*** Moreover, to the extent that Wilson claims that Dale Wiggins is liable by submitting Orr's claims for payment, this would sustain a cause of action only if Wiggins was a member of the conspiracy. ***Id.*, at 1038-39.** However, Wilson has failed to show or even allege that Wiggins, or the County through his conduct, was a member of the alleged conspiracy. The Court, therefore, rejects the conspiracy claim against Dale Wiggins and Graham County.

Next, Wilson claims that when Wiggins, as the manager for the County, processed the payment forms for Orr's work, he submitted false claims on behalf of the County to the federal government.[24] Wilson raises numerous reasons why these submissions were false, the first of which was that no bids were entertained for the 650 project in violation of N.C. Gen. Stat. § 143-131.

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[24]Wilson has limited her claims in this regard to Orr and the 650 project.

The NRCS entered into a performance of work agreement with Graham County. Every federal agent involved in this case has testified that federal regulations, which governed the contract, did not require either Graham County or the Graham County Soil & Water Conservation District to receive bids for the performance of the contract. ***See* Caldwell Declaration, *supra*; Jacob Crandall Deposition, *supra*; Richard Greene Deposition, *supra*; Howard Tew Deposition, *supra*; Levourn Wiggins Deposition, *supra*.** Graham County was, according to the federal agents involved, entitled to enter into an agreement with the Graham County Soil & Water Conservation District for the performance of this work. ***See id.*** In fact, NRCS advised these entities to structure this project in that fashion. ***Id.*** There was no testimony that bidding was required; to the contrary, the testimony was that bidding was not required. In fact, Greene and Tew both testified that it was difficult to find contractors for such work which had to be done quickly.

Moreover, Wilson has not shown in what manner a failure to bid the project resulted in the presentation of a false claim to the government. Her argument is that the initial failure to obtain bids tainted the entire process thereafter. And, although she alleged that the project agreement between NRCS and Graham County

required bidding, the evidence shows that it did not. Wilson's argument is that because a North Carolina statute may have required bids to have been solicited,[25] the claim thereafter presented by Graham County for EWP-216 funds was false. "'The False Claims Act does not create liability merely for a [defendant's] disregard of [state] regulations or improper internal policies unless, as a result of such acts, the [defendant] knowingly asks the Government to pay amounts it does not owe.'" ***United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1357 (11th Cir. 2006) (quoting *United States ex rel. Clausen v. Lab. Corp. of Am.* , 290 F.3d 1301, 1311 (11th Cir. 2002)).** In fact, a false certification that the County had complied with N.C. Gen. Stat. § 143-131 would not serve as a basis for a False Claims Act violation unless payment of the claim submitted was conditioned on that certification. ***United States ex rel. Siewick v. Jamieson Science & Eng'g., Inc.*, 214 F.3d 1372, 1375 (D.C. Cir. 2000).** In this case the certification provided was that payment of the claim submitted would be "in accordance with the grant conditions or other agreement[.]" **Attachment A, *attached to* Caldwell Declaration.** The federal employees all testified that submitting claims for payment from Orr

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[25]In fact, the reading of that statute as it existed in 1995 is not at all clear. In any event, for the reasons stated *infra*, it is not dispositive.

did not violate any conditions of the EWP-216 program. Moreover, even if Graham County violated N.C. Gen. Stat. § 143-131, a violation of that statute alone does not create a cause of action under the False Claims Act unless the claim actually presented for payment was fraudulent. ***Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 878 (6th Cir.), *cert. denied*, 127 S. Ct. 303 (2006).** In other words, the failure of either Graham County or the Graham County Soil & Water Conservation District to seek bids on the 650 project does not render the claims for payment for Orr's work fraudulent. The failure to bid "at the heart of the allegation of fraud in this case is . . . not a violation of the Act, 'because the statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'" ***Id.* at 877-78 (quoting *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995)) (other citations omitted).** "[C]laims for services rendered in violation of a statute do not necessarily constitute false or fraudulent claims under the FCA." ***Id.* at 878 (citing *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996)).**

Thus, Graham County and Wiggins cannot be liable unless they presented false or fraudulent claims for payment to the federal government. Both Tew and

Wiggins testified that they uncovered a mistake in Orr's billings which they corrected. In fact, Graham County alerted NRCS to the correction. Levourn Wiggins wrote a detailed letter to Tew before Orr's final payment in which he advised that the information contained therein should be used to determine the final payment. In the final certification for payment to Orr, Tew deducted amounts which Levourn Wiggins determined could not be justified. In other words, the federal government did not actually make payment and Wilson herself admitted that the billing error could have been a mistake. Wilson has failed to show that Orr, the Graham County Soil & Water Conservation District or Graham County knowingly made a false or fraudulent statement which was material and which caused the federal government to expend funds. ***Harrison, supra.*** Indeed, the evidence is to the contrary; that is, Graham County informed the NRCS that the bills were erroneous and the bills were corrected. Thus, even if the claims for payment were incorrect, it was not material in the sense that it had a natural tendency to influence agency action since NRCS was well aware of the problems. ***Id.***

Wilson also argues that by allowing Orr to do the work on the 650 project, Graham County violated the Code of Conduct which was submitted in the

application for EWP funds.[26] That Code provided that no employee of Graham County could participate in the administration of a contract supported by federal funds if he had a financial interest in the contract. **Deposition Exhibit 7, *attached to* Wiggins Deposition, Vol. 1, *attached to* Graham County Defendants' Motion.** Orr was not an employee of Graham County. As noted previously, although Wilson tried to characterize him as such by misstating the source of his salary, Orr was an employee of the Graham County Soil & Water Conservation District. As a result, he was not banned by the Code of Conduct from the contract. **Tew Deposition, *supra*.** And, as noted infra, even if awarding the contract to him did violate that code, it would not create liability for the disregard of the governmental regulation "'unless, as a result of such acts, [Graham County] knowingly ask[ed] the Government to pay amounts it [did] not owe.'" ***McNutt ex rel. United States v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005) (quoting Clausen, *supra*).** Wiggins, Caldwell

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[26]While Wilson also claims that there was no written contract, she admitted that a written contract did "show up." The implication is that Dale Wiggins authored a contract after the fact. However, without any evidence other than Wilson's speculation, the Court does not accept the characterization that there was no contract.

and Tew all testified that in their opinions there was no prohibition in granting the contract to Orr. In fact, this issue was discussed by the NRCS employees and a conclusion was made that Orr could properly perform the contract. Thus, assuming *arguendo* that Graham County violated the code of conduct, such violation did not cause either Graham County or the Graham County Soil & Water Conservation District to *knowingly* ask the federal government to pay amounts which it did not owe.

Wilson also argues that Dale Wiggins and Graham County either should have known or were negligent in not ascertaining whether bidding was required and whether Orr could perform the contract under the code of conduct. Again, every federal agent testified that at the time no one considered the administration of the contract to be improper. Moreover, "'[i]nnocent mistakes or negligence are not actionable; [w]hat constitutes the offense is not intent to deceive but knowing presentation of a claim that is either fraudulent or simply false.'" ***Durcholz*, 189 F.3d at 544 (quoting *Hindo v. Univ. of Health Sciences/The Chicago Med. Sch.*, 65 F.3d 608, 613 (7th Cir. 1995)).** As has been noted, the claim for work was neither.

There is another reason why Wilson's claims against Graham County and Wiggins fail. Wilson testified that in 1995 she told two NRCS employees of her suspicions and Orr's inappropriate conduct.

> The government's prior knowledge of an allegedly false claim can vitiate a FCA action. If the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim. In such a case, the government's knowledge effectively negates the fraud or falsity required by the FCA.
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> . . .
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> [NRCS] officials were more interested in speed than cost and made their decisions in accordance with these priorities. . . . In essence, then, [Wilson] is alleging that the government was defrauded by the very activities that its agents ordered. . . . The government knew what it wanted, and it got what it paid for.
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> . . .
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> [Indeed] [i]t appears that [NRCS] officials, wanting to expedite the project and still choose the method of

> performance, may have stretched the contracting regulations to or beyond their limits. "But the FCA is not an appropriate vehicle for policing technical compliance with administrative regulations."

Durcholz, supra*, at 544-45, n.2 (quoting *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999)).** Greene, Tew, Crandall and Caldwell, all NRCS employees, each testified that bidding was not required and there was no conflict of interest in allowing Orr to do the work. "The FCA is a fraud prevention statute; violations of [state bidding laws or conflict of interest rules] are not fraud unless the violator knowingly lies to the government about [the claim]." ***Id. Greene, Crandall, Tew and Caldwell all knew that Orr was doing the work without having bid on the contract and while he was an employee of Graham County Soil & Water Conservation District. "[T]he government's knowledge of facts underlying an allegedly false record or statement can negate the scienter required for an FCA violation." ***United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 289 (4th Cir. 2002).**

The government knowledge defense also makes short shrift of Wilson's claims that Wiggins submitted false claims because the work done by Orr was incomplete in three ways: the total amount of re-seeding work was not done; some filter fabric paid for under the contract was not installed; and a driving cap for which Orr charged was not installed. It is first noted that Wilson has not shown that the claims submitted were "false" or "fraudulent" in the sense required by the False Claims Act. Wiggins testified that he reviewed the invoice for re-seeding work and learned that some of the work had not been completed. As a result, the value of this work was deducted from the next amount of money owed to Orr. Wilson admitted that the claims could have been the result of negligence or mistake. And, the forms submitted by Wiggins for payment were approved by Greene and then again by Caldwell.

After Greene was removed from his position, Levourn Wiggins wrote a lengthy letter to Tew detailing Orr's work, the three discrepancies noted above and the amounts which he felt should not be paid. Tew gave final certification for Orr's payment with full knowledge of Levourn Wiggins' inspection and opinion. Moreover, Tew himself wrote to his superior, Berkstresser, to outline the problems, noting that the issue concerning filter fabric had actually been

created by his predecessor Greene, a NRCS employee. Tew testified that he deducted these three items from the certification for final payment. In effect, Tew placed the issues in the lap of his superiors, Berkstresser, Caldwell, and Crandall, who authorized the final payment by NRCS with full knowledge of the underlying facts. If Orr received full payment, that was due to the decision of NRCS employees superior to Tew. The final installment was paid to Orr in July 1996, well after the time that NRCS was aware of the alleged discrepancies. "[T]he government's knowledge of facts underlying an allegedly false record or statement can negate the scienter required for an FCA violation." ***Id.***

This ruling is twofold. Orr's claims for re-seeding were reviewed by Dale Wiggins, a Graham County employee, who found errors which he corrected. Those amounts were deducted from Orr's next payment so a false claim was not paid by the government. Thus, Wiggins could not be deemed to have made a false claim to the government. ***Harrison*, 176 F.3d at 789-90 (poor management not tantamount to fraud)**. Likewise, Levourn Wiggins performed a review of Orr's billings and wrote a letter to his superior, Tew, outlining the discrepancies which he found. In that letter, Wiggins pointed out that Graham County had corrected billing errors, there was

an issue as to whether Orr had actually installed a driving cap for which he had been paid, and there was an issue concerning the filter fabric. The evidence shows that everyone involved was well aware of the discrepancies and yet the NRCS made a final payment. The government knowledge defense thus precludes this claim.

The Court finds summary judgment appropriate for Defendants Graham County, Dale Wiggins, Raymond Williams and Lynn Cody.

The Court does not permit the filing of a "sur-reply" without leave to do so; therefore, Plaintiff's "sur-reply" filed in response to the Defendants' reply has not been considered by the Court.

B. The motion for summary judgment of Defendants Graham County Soil & Water Conservation District, Gerald Phillips, Alan DeHart, and Lloyd Millsaps.

These Defendants moved for summary judgment raising the same grounds as those discussed above. They argue that Orr did not have a conflict of interest because he was not covered by the Code of Conduct; neither Graham County nor Graham County Soil & Water Conservation District was required to seek bids

for a performance of work agreement; in view of the advice given to the Graham County Soil & Water Conservation District by the federal employees, it could not be argued that fraudulent claims were presented by the District; and there were no false certifications. For the same reasons as stated *infra*, summary judgment for these Defendants on these grounds is appropriate.

One issue raised by these Defendants which was not addressed in depth above is the question of whether Orr was a local inspector and whether that status amounted to a conflict of interest. This issue, however, was answered by the undisputed testimony of Crandall who stated that until the project work was inspected by the government inspector, no payment would be made regardless of any inspection by an employee of the local entity. **Exhibit 3, Crandall Deposition, *attached to* Reply of Graham SWCD Defendants to Relator's Opposition, filed December 22, 2006, at 69 ("Q: Are you aware that the Graham County Soil & Water Conservation District either asked or may have asked some of its employees to inspect work that was being done under the performance of work agreement?" "A: No." "Q: [W]ould an inspection done by someone other than the government representative have been sufficient . . . for NRCS**

to approve payment under the EWP program?" "A: No."). Thus, it was impossible for Orr to receive payment unless a federal inspector approved his work. In fact, Greene, Timpson, Tew and Levourn Wiggins each inspected various portions of the work for which claims were ultimately submitted. Since payment was conditioned on inspection by a federal inspector, Orr's status, or lack thereof, as an inspector for the Graham County Soil & Water Conservation District was of no moment. He simply could not inspect his own work and thus obtain payment.

The other issue raised by these Defendants is a claim that Orr actually did perform all the work for which claims for payment were submitted. Whether Orr performed all the re-seeding required is of no moment because he was not paid for work which Wiggins and federal employees determined had not been performed. Although Wilson made a general allegation that Orr submitted a false bill for re-seeding, she has not come forward with anything other than speculation that Orr knowingly submitted a bill for seeding work which he did not do. It has not been shown this was anything more than a mistake.

As to the issue of the driving cap, the evidence shows nothing more than a disagreement, not a knowing act to defraud the government. Finally, as to

the filter fabric, Tew specifically opined that no fraudulent conduct had occurred. Final certification was made after Tew deducted these three items and the final bill was ultimately paid. NRCS paid the bill with full knowledge. Obviously, none of these matters could be material since the local and federal governmental entities involved were aware of the issues. In essence, Orr's actual bills did not have a natural tendency to influence agency action; indeed, his bills were scrutinized.

In response to these Defendants' motion for summary judgment, Wilson renews her argument that she informed the Graham County Soil & Water Conservation District that a conspiracy existed among Orr, Timpson and Greene but the District ignored her evidence and allowed the conspiracy to go forward. The same argument was made and rejected in connection with the Graham County Defendants' motion for summary judgment, and it is rejected here on the same reasoning.

Wilson also argues that there is no way the District could not have known that Orr's claims were false. For years, she argues, the District knew that Greene sold filter fabric to the District through his wife's company, Fantasia. Thus, the District should have been on notice that Greene was dishonest. These allegations

are outside the scope of the complaint and, in any event, were publically disclosed prior to any information provided by Wilson.

Moreover, assuming the truth of Wilson's allegations, the evidence shows that any such conduct abruptly halted in 1993 when Crandall discovered the arrangement. The EWP-216 project did not occur until early summer 1995. And, the fact remains that Greene was the NRCS employee delegated as government representative on this project. As such, his job was to assist Graham County with structuring the contract and to certify that the work had been performed. Both Graham County and the Graham County Soil & Water Conservation District had no choice. Each had to rely on Greene for assistance in the program and in certifying the claims for reimbursement. Greene's prior dishonest conduct, even if true, did not dispel the fact that he remained employed by the NRCS and the local agencies, of necessity, relied on his advice in obtaining and performing this EWP project.

Wilson next claims that Greene actually "ran" the District. As proof, she raises a claim never before made. Wilson claims that one of the supervisors of the Graham County Soil & Water Conservation District, Allen Dehart, was given a job by Greene in connection

with the EWP-216 project. Dehart testified that he took a job from Greene removing debris from the EWP-216 site but he was not paid from that program.[27] **Attachment A, Deposition of Allen Dehart, *attached to* Relator's Opposition to Graham SWCD Defendants' Motion, filed December 18, 2006, at 14.** In fact, Dehart testified that he did not complete the job and there is no indication that he was ever paid any amount. ***Id.* at 14-15.** Wilson does not allege that Dehart in some manner submitted a false claim; her allegation is merely that his work at the EWP site shows that Greene was in charge of the entire operation. Assuming arguendo that this is true, "the government's knowledge of facts underlying an allegedly false record or statement can negate the scienter required for an FCA violation." **Becker, *supra*.**

Wilson cites portions of the testimony from Tew and Crandall to show that there was not, in fact, full government knowledge. These federal employees, she claims, did not fully understand that Orr was doing the work of EWP-216 in addition to his job as an employee of the District. Tew actually testified that, "as far as NRCS is concerned with performance of

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[27]Like Orr, Dehart was not an employee of Graham County and the Code of Conduct, therefore, did not technically apply.

work, I'm not aware that there was ever a case where we would insist on them getting competitive bids." **Attachment O, Howard Tew Deposition, *attached to* Relator's Opposition, at 97.** He also testified that Orr was not prohibited from doing the work by the Code of Conduct because the project was a performance of work agreement. **Exhibit 5, Tew Deposition, *attached to* Graham SWCD Defendants' Reply, at 37.** Levourn Wiggins testified it was reasonable for county officials to rely on the advice given by the NRCS employees. **Attachment K, Levourn Wiggins Deposition, *attached to* Relator's Opposition, at 48.** And, contrary to Wilson's representation, Crandall actually testified that there was no federal or local policy which would have prevented a county technician, such as Defendant Keith Orr, from actually doing the work. **Exhibit 6, Crandall Deposition, *attached to* Graham SWCD Defendants' Motion, at 66.** Moreover, Wilson herself claims that at some point in 1995, she informed NRCS employees, including supervising employees Cecil Settle and Michelle Wilson in Raleigh, of her concerns with Orr and the EWP-216 project. Nonetheless, Orr received at least three payments after that time; thus, he received payments after the NRCS employees had full knowledge of her claims. In fact, Orr received his last payment over the objection of Dale Wiggins and Tew. The letter written by Levourn Wiggins to Tew

fully outlined the problems involved in the project; yet, Tew left it to his superiors to determine whether or not to pay Orr's claims. In fact, they approved the final and last payment to Orr and declined at any point to attempt to recover any portion from Graham County. Wilson has failed to show that the federal government did not have full knowledge of the circumstances involved with this project.

It is interesting that Wilson testified during one of her depositions that she had also intended to perform work in connection with the EWP-216 at one point. **Exhibit 1, Wilson Deposition, Part 3, *attached to* Graham SWCD Defendants' Reply, at 58-59.** Wilson offered to find comparisons of tree costs for the project. ***Id.***

> Q: Were you planning on getting paid like Mr. Orr was getting paid when you discussed doing these things?
>
> A: No, not after I realized what the contract consisted of. I didn't do any of the EWP 216 work.
>
> Q: Before you knew what the contract consisted of, you had planned on getting paid for the EWP work in Graham County?

A: I don't know.

Id. At the very least, this testimony shows that at one point, Wilson thought that working on the project while employed by the District was not a problem.

The complaint makes broad accusations that Gerald Phillips instructed Wilson to pay Orr whether or not he completed his work and that Phillips thus conspired with Orr. It makes a broad accusation that Dehart conspired with Phillips, Greene, Timpson and Orr during a closed board meeting. In response to the motion for summary judgment, Wilson has not pointed to any individual conduct of Phillips, Dehart or Millsaps. The only mention of Dehart was that at one point he was asked to remove some debris by Greene. There is no evidence that Dehart either did or was paid for that work. For the reasons stated *infra*, the Court finds Wilson has failed to prove these individuals' membership in a conspiracy. Wilson has also failed to bring forth evidence sufficient to withstand summary judgment as to these individuals.

As stated previously, the Court does not permit the filing of a "sur-reply" without leave to do so; therefore, Plaintiff's "sur-reply" filed in response to the Defendants' reply has not been considered by the Court.

C. The submission by Wilson of an "*errata*" sheet.

The Graham County SWCD Defendants filed a reply to Wilson's opposition to their motion for summary judgment. Attached to that reply as Exhibit 2 is a portion of a deposition of Wilson. Attached to that deposition transcript is a letter from Wilson which explains that she has provided an "*errata*" sheet concerning her testimony. In that sheet, Wilson makes complete changes of her testimony with explanations such as "[s]tatement corrected after memory was refreshed" and "[c]orrected statement." Most of these so-called corrections amount to substantive modifications of her previous sworn testimony. "Given the conflicts between [Wilson's] ["errata" sheet] and [her] deposition testimony, the district court [is] left not with a genuine issue of material fact, but with trying to determine which of several conflicting versions of [Wilson's] testimony was correct." ***Rohrbough*, 916 F.2d at 976; Spriggs, 242 F.3d at 186 n.7 ("In *Rohrbough*, we reaffirmed the long-standing principle that a party against whom summary judgment is sought cannot create a jury issue by identifying discrepancies in his own account of the facts.").** Thus, the undersigned disregards this sheet even though Wilson signed it under oath. ***Id.***

D. The motion for summary judgment of Defendants Cherokee County Soil & Water Conservation District, Bill Tipton, Eddie Wood and C.B. Newton.

The allegations of the complaint against these Defendants include a claim that Orr, Greene, Timpson, Billy Brown and Brown Construction conspired to make false claims under the EWP-216 program for Cherokee County. It is also alleged that these same four individuals divided the proceeds of such claims among themselves. As for the individual Defendants, the complaint alleges that Tipton, Wood and Newton voted in favor of submitting these claims for payment despite knowing they were false. These three are not alleged to have shared in the division of proceeds. The complaint also alleges that the claims were improper because no bidding occurred in connection with the project. Finally, the Cherokee County Soil & Water Conservation District (Cherokee District) is alleged to have concealed these claims by a letter written by Lloyd Kissselburg, chairman of the Cherokee District, on December 7, 1995, to Bruce Lewis of Graham County denying that any payments had been made to Orr.

Wilson testified that Eddie Wood failed to fulfill his duties as a supervisor for the Cherokee District by

failing to insist that bids be solicited for the performance of work agreement. **Wilson Deposition (taken August 17, 2006), *attached to* Cherokee SWCD Defendants' Motion, at 18 (Bates No. 00065).** Wilson also testified, however, that she was not employed by the Cherokee District and was not present at any district meetings during which action was taken concerning the EWP-216 project. ***Id.* at 19 (Bates No. 00066).** As to Defendant Tipton, Wilson's allegations against him are based on his failure to fulfill his duties as a supervisor for the Cherokee District. ***Id.*** Wilson's allegations against Defendant Newton are based on the same failure. ***Id.* at 20 (Bates No. 00067).** Since the allegations against these Defendants are based on the claim that failing to bid out the performance of work agreement was improper, summary judgment is appropriate for the reasons stated infra in connection with the issue of failure to bid the Graham County performance of work agreement.

In opposition to the motion, Wilson makes several arguments, most of which have been rejected in connection with the motions of other Defendants. First, Wilson renews her claim that Greene sold filter fabric through his wife's company to the Cherokee District from 1988 through 1993, with District employees being paid bonuses from those sales. She

also claims that Orr told her he was going to allow Brown to do the work in Cherokee County because people were getting suspicious. Wilson alleges that Greene and Timpson inspected Brown's work in the Cherokee District at the same time that they were sharing in the proceeds. Cherokee District provided employees to haul timber from the EWP-216 site to Valwood which then issued checks for the timber to Greene. Cherokee District verified that the work was properly done in order to obtain payment from Cherokee County and Cherokee County submitted the claim for payment.

Each of these claims has previously been rejected and for the reasons stated infra, each is rejected in connection with these Defendants.

Wilson also alleges that the District effectively allowed Greene to "call the shots" with respect to the EWP-216 program, thus, the District inappropriately allowed Brown to do the work. Brown was not an employee of either Cherokee County or Cherokee District; instead, he ran a company known as Brown Construction. Wilson alleges, but does not provide any evidence, that Greene and Brown were childhood friends. The Cherokee County 640 agreement was awarded to Billy Brown while the equipment rental was awarded to Phillips and Jordan, Inc. **Deposition**

Exhibits 9 and 10, *attached to* Attachment B, Deposition of Eddie Wood, *attached to* Relator's Opposition to Cherokee SWCD Defendants' Motion, filed December 18, 2006. The only allegation Wilson makes against Brown is that he received this contract illegally because it was not bid out and he agreed with Timpson, Greene and Orr to divide the proceeds thereof. Greene and Timpson were the government inspectors for the performance of work agreement in the Cherokee District. ***Id.*** However, as stated infra, there is no evidence that the contract should have been bid and Wilson has failed to show an agreement to divide proceeds. In fact, as a result of Agent Golec's investigation of this same claim for the United States Department of Agriculture, he concluded as follows:

> Greene recommended that a Robbinsville, North Carolina businessman, William "Billy" Brown, be awarded work under the EWP program [in Cherokee County] and NCACSP and later provided the use of his credit account at a farm supply store for Brown to purchase supplies for the EWP work. The investigation also revealed that Greene and Timpson hauled supplies for Brown to work sites, however, no evidence was developed

> which established a partnership arrangement between Brown, Timpson or Greene.

Report of Investigation, *supra*, at 2 (emphasis added). The United States government, on whose behalf Wilson claims to have brought this action, therefore, concluded that there was no evidence to show a business arrangement among these men. Indeed, Greene was indicted by the United States for other illegal activities, including the sale of timber to Valwood, but not in connection with any other conduct related to the EWP-216 projects for either Graham or Cherokee Counties.[28] **Bill of Indictment, *attached to* Shelton Affidavit, *attached to* Cherokee SWCD Defendants' Reply in Support of Summary Judgment.**

In fact, although it is alleged that Brown received the contract, there is no proof that any payment received by him resulted from a false claim. As was the case with Graham County, Crandall verified to NRCS that the Cherokee County Performance of Work

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[28]Greene was indicted for the conversion of the timber sold to Valwood Corporation, the sale of filter fabric through his wife's business, and his participation in G&L Farms. ***See* Bill of indictment, *supra*.**

Agreement "was performed in accordance with the contract requirement" and he "recommend[ed] we make payment to the County of Cherokee as requested." **Attachment H, Crandall letter dated March 14, 1997, *attached to* Relator's Opposition to Cherokee SWCD Defendants' Motion.** Moreover, this recommendation was made after Crandall and the NRCS supervisors in Raleigh were well aware of "the controversy that is going on in Graham County." ***Id.***

As for the Cherokee District, Crandall also testified that the District relied on the NRCS employees to make sure that the specifications for the work were performed. **Attachment I, Crandall Deposition, *attached to* Relator's Opposition to Cherokee SWCD Defendants' Motion, at 47-48.** In fact, the function of NRCS was to provide personnel to assist the local Soil & Water conservation district. ***Id.* at 50.**

Finally, there has been no showing that the federal government paid a claim to Cherokee County, as a result of the submissions by Cherokee District, that was false. In fact, all of the evidence is to the contrary; that is, the work was done, it was done properly, and it was not overcharged. Wilson's claims of fraud are based solely on the failure to bid and her speculation that Greene, Orr, Timpson and Brown conspired to

give the contract to Brown and then split the proceeds. Wilson has failed to come forward with admissible evidence sufficient to withstand summary judgment as to these claims. Moreover, assuming arguendo that these allegations are true, the fact remains that the actual claim submitted in connection with the Cherokee District was not false. And, the evidence shows that many federal officials had full knowledge of the contract, the work, who was doing it, the amount charged, the inspection, and the approval of payment for the work. ***See, e.g.*, Attachments A and G, Greene Deposition, *attached to* Relator's Opposition to Cherokee SWCD Defendants' Motion; Attachment B, Wood Deposition, *supra*; Attachment C, Decker Deposition, *supra*; Deposition Exhibits 9 and 10 *attached to* Wood Deposition, *supra* (showing the appointment by the NRCS of Timpson and Greene as inspectors for the Cherokee County project); Attachment H, Crandall Letter (verification of final payment sent to NRCS employee George Stem, March 14, 1997), *supra*; Attachment I, Crandall Deposition, *supra*; Attachment K, Tew Deposition, *supra*.**

The Court does not permit the filing of a "sur-reply" without leave to do so; therefore, Plaintiff's "sur-reply" filed in response to the Defendants' reply has not been considered by the Court.

E. The motions for summary judgment of Defendants Greene, Orr and Brown.

Defendants Greene and Brown were sued in their individual capacities and Defendant Orr was sued in his individual and official capacities. All three have raised the public disclosure defense arguing that Wilson's allegations stem from documents she received from government entities and/or governmental investigations. For example, they point to the following admissions of Wilson during her various depositions:

1. Wilson admitted copying documents which came through her office, the Graham County Soil & Water Conservation District. **Appendix Exhibit 1, Wilson Deposition of August 17, 2006, *attached to* Motion of Defendants Billy Brown, Keith Orr and Richard Green for Summary Judgment, filed December 1, 2006, at 157.**

2. Wilson also received copies of documents from the Farm Services Agency, Graham County Board of Commissioners, Cherokee County Soil & Water Conservation District, the North Carolina Soil &

Water Conservation Commission, DENR,[29] and the United States Office of Inspector General. ***Id.***

3. Information which Wilson received concerning checks written to Brown and Orr came from documents supplied to her from Karen Bates, the secretary for the Cherokee County Soil & Water Conservation District. **Appendix Exhibit 2, Wilson Deposition, *attached to* Defendants' Motion, at 35-36.**

To the extent that these documents came from governmental audits, investigations or hearings, they were publicly disclosed. "Administrative reports are publicly disclosed because, by their very nature, they establish the relevant agency's awareness of the information in those reports." ***Feingold*, 324 F.3d at 496.** "Public board meetings certainly qualify as an administrative hearing. Further, documents filed with an agency during administrative proceedings ... are also considered publicly disclosed." ***United States ex rel. Englund v. Los Angeles County*, 2005 WL 2089216, *7 (E.D. Cal. 2005) (internal citations omitted).**

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[29]No party has provided the identity of the organization for which this acronym applies. It appears, however, to refer to the North Carolina Department of Natural Resources.

Dale Wiggins testified that some of Greene's conduct came to light during an audit by the North Carolina Agriculture Cost Share Program. **Appendix Exhibit 9, Deposition of Dale Wiggins taken August 16, 2006, *attached to* Defendants' Motion, at 44.** This is the same investigation referred to by Agent Golec in his report and as such, was completed prior to Wilson's statements to Golec and prior to Golec's investigation. Both investigations are governmental or administrative investigations and, therefore, were publicly disclosed. ***Feingold, supra* ("Those documents were administrative reports; *i.e.*, they were reports issuing from the HCFA, an agency of the federal government. Because the purpose of a public disclosure is to alert the responsible authority that fraud may be afoot, and that purpose is served where that authority has itself issued the reports containing information that substantiates an allegation of fraud, we hold that the HCFA reports were placed in the public domain.").**

The Defendants also argue that Wilson obtained copies of the checks from Valwood Corporation after they were introduced into evidence at Greene's criminal trial and had thus been made public. Although Wilson claims that Lavina West, Valwood's secretary, provided her with those copies, West

provided an affidavit in which she averred that in January 1997, she gave those documents to the Inspector General in response to his subpoena. **Appendix Exhibit 6, Affidavit of Lavina West, *attached to* Defendants' Motion.** West also averred that the first and only time she provided information to Wilson was in February 2002 when she wrote a letter explaining the transactions but did not include the actual document submitted to the Inspector General. ***Id.*** Greene's criminal trial took place in May 1999 and was obviously completed long before West sent her letter to Wilson.

The Court has previously concluded that the public disclosure doctrine precludes this suit. The above allegations merely reinforce that conclusion. In short, Wilson has not shown that she is an original source for any of the information involved in this lawsuit. The public disclosure provisions of the False Claims Act preclude "parasitic" lawsuits, in which "relators, rather than bringing to light independently-discovered information of fraud, simply feed off of previous disclosures of . . . fraud [against the government.]" ***United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347 (4th Cir. 1994).** Although Wilson argued that she was an original source, she failed to show that her knowledge of the events at issue was "direct," that is, that she

"acquired it through [her] own efforts, without an intervening agency" and that it was "independent," that is, "not dependent on public disclosure." ***Grayson v. Advanced Mgmt. Tech. Inc.*, 221 F.3d 580, 583 (4th Cir. 2000).**

The Defendants also argue that Orr and Brown did not submit false claims by virtue of accepting work which was not placed out for bid. Whether there was a requirement to bid out performance of work agreements has previously been determined adversely to Wilson. Thus, neither Orr nor Brown may be deemed to have filed a false claim due to lack of bidding.[30]

Moreover, there has never been an allegation that Brown failed to adequately perform the work done for the Cherokee County Soil & Water Conservation District. By all accounts, Brown did the work required by the agreement, did the work properly, and received approval by the government inspector as well as the government representative. There are simply no allegations otherwise.

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[30]Moreover, a bidding requirement, if it existed, would be imposed on the local agencies, not the individuals providing quotes to do the work.

As to Orr, the allegations are that he failed to complete all of the work for which he submitted claims. However, these allegations as well have been exhaustively explored. As with Brown, Orr's claims were finally approved by NRCS employees higher up in the supervisory chain than Greene, Timpson or Tew. The bottom line is that NRCS was fully aware of the contentions involving Orr and reimbursed both Graham and Cherokee Counties without ever seeking a recovery from either entity.

As to Defendant Greene, it is clear that he was involved in conduct ultimately determined to be illegal. He was tried and convicted of such conduct before Wilson initiated this lawsuit. The allegations involved in his criminal trial were made public no later than the date of his indictment in 1999 and certainly at the time of the various investigations by state and federal authorities. To the extent that Wilson has attempted to bootstrap that conduct into this litigation, she is precluded by public disclosure and governmental knowledge.

Wilson's final claim is that Orr, Greene, Brown and Timpson conspired and agreed to share the proceeds from the EWP-216 project among themselves. The OIG which investigated the same claims now raised by Wilson concluded there was no agreement among these

men. As to Brown, Wilson admitted that she could not state he was actually involved with a conspiracy. As to Orr, Greene and Timpson, Wilson has shown nothing more than speculation that these men had any such agreement or that they in fact shared money.

In response to the motion for summary judgment, Wilson argued that the claims submitted for payment by Orr and Brown were false because they did not include the names of Greene and Timpson as contractors. Wilson has not provided any evidence beyond speculation and innuendo that Greene and Timpson shared in the EWP-216 proceeds. Agent Golec specifically found no evidence of any agreement among the men despite a thorough investigation. And, as previously noted, NRCS employees knowingly approved of the claims.

Wilson also argues that when Greene received checks from Valwood Corporation for the logs, it created a "reasonable inference to be drawn from those payments . . . that they were kickbacks for Greene's inspection approvals that led to the submission and approval of Cherokee County's claims to the Government for the EWP-216 Performance of Work program[.]" **Relator's Opposition to Defendants' Motion for Summary Judgment, filed December 18, 2006, at 6.** As previously noted, Agent Golec made

an extensive investigation of this issue and did not include Wilson as a source of information. Greene was prosecuted in federal court in connection with this issue prior to the filing of Wilson's lawsuit. And, Wilson's conclusion that Greene received the checks at issue as kickbacks in exchange for approving Brown's work is nothing more than speculation. Assuming *arguendo* that Valwood paid Greene checks and that this money was a form of kickback, Wilson still has not shown that the claims submitted by Brown to the EWP-216 program were false. In other words, even if Cherokee County Soil & Water Conservation District knew that Greene received checks from Valwood for timber, and even if the District allowed Greene to keep that money as a form of kickback, Brown's claims have not been shown in any manner to be false. The claims submitted by Brown were for work properly completed, inspected and approved by NRCS employees. As noted by this Court in another case, "[w]hile the [individuals] themselves may have violated some regulation, there is simply no admissible evidence that the Defendants presented or prepared false [claims]." ***United States ex rel Phillips v. Pediatric Servs. of Am.*, 223 F.Supp.2d 763, 765 (W.D.N.C. 2002).** Wilson has "completely failed to present any evidence that a false [claim] was ever presented to the government" in connection with the Cherokee District contract. ***Id.* at 766.**

Since the Court finds that summary judgment is appropriate as to these individual Defendants, it is also appropriate on behalf of Defendant Timpson who has appeared in this action only in a pro se capacity.

As with the other Defendants, the Court does not permit the filing of a "sur-reply" without leave to do so; therefore, Plaintiff's "sur-reply" filed in response to the Defendants' reply has not been considered by the Court.

F. Wilson's request for additional discovery pursuant to Rule 56(f).

Contained within Wilson's opposition to summary judgment is the following:

> [T]he Court should deny summary judgment pursuant to Rule 56(f) because, as demonstrated in the attached declaration of relator's counsel Mark Hurt, in light of the loss of the deposition transcript of party defendant Billy Brown by the court reporter and the prohibition by the Court of relator's redeposition of Brown, relator is unable to present facts essential to the opposition of the summary judgment motion.

Relator's Opposition, *supra*, at 2.

The Pretrial Order and Case Management Plan filed in this case provided notice to all parties that discovery would end on November 1, 2006, with dispositive motions being due on December 1, 2006. On December 8, 2006, after both deadlines had passed, Wilson filed an "emergency motion" to obtain an extension of time within which to respond to the summary judgment motions because she did not have the Brown transcript. In denying that motion, the undersigned made several observations: (1) Wilson's attorneys were unaware the deposition transcript had been lost until after the above deadlines had passed; (2) defense counsel offered to schedule another deposition of Brown but Wilson's attorneys never responded; (3) Wilson's attorneys did not claim the transcript was necessary, only that Brown's testimony was "potentially" relevant; (4) Wilson's attorneys, at least one of whom was present at that deposition, failed to identify any portion of Brown's testimony that was relevant.

Wilson now claims that further discovery in the form of Brown's deposition is necessary in order to withstand summary judgment. On January 13, 2006, the undersigned imposed a discovery deadline of April 28, 2006, in this case after it was remanded by the

United States Fourth Circuit Court of Appeals. On March 16, 2006, discovery was extended through June 28, 2006. On June 13, 2006, discovery was extended through August 12, 2006. Finally, on September 6, 2006, for the fourth time, the undersigned extended discovery through November 1, 2006. Brown's deposition was held on September 29, 2006, but the first time Wilson's attorney realized there was a problem with the transcript was after the discovery and dispositive motions' deadlines had passed. Wilson has had more than ample opportunity to conduct discovery in this action. ***Bolden v. City of Topeka, Kan.*, 441 F.3d 1129, 1151 (10th Cir. 2006) ("Rule 56(f) grants discretion to the court to delay ruling on a motion for summary judgment. It does not compel the court to grant a continuance to a party that has been dilatory in conducting discovery."); *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1005 (9th Cir. 2002) ("The failure to conduct discovery diligently is grounds for the denial of a Rule 56(f) motion.").** She still has not identified any portion of Brown's previous testimony that would support her case. Nor were her requests regarding this issue made in a timely manner. ***Ingle ex rel. Estate of Ingle v. Yelton*, 439 F.3d 191, 196 (4th Cir. 2006) ("'[T]he denial of a Rule 56(f) application is generally disfavored where the party opposing summary judgment makes (a) a**

timely application which (b) specifically identifies (c) relevant information (d) where there is some basis for believing that the information sought actually exists.'") (quoting *VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986)).

VII. ORDER

IT IS, THEREFORE, ORDERED that the Defendants' motions for summary judgment are hereby **GRANTED**.

IT IS FURTHER ORDERED that the Plaintiff's request for additional discovery is hereby **DENIED**.

A Judgment incorporating the findings herein is filed contemporaneously herewith.

Signed: March 13, 2007

/s/ Lacy H. Thornburg
Lacy H. Thornburg
United States District Judge

31 U.S.C. § 3729 (2000) (FALSE CLAIMS ACT)

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS. Any person who--

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

31 U.S.C. § 3729 (2000) (FALSE CLAIMS ACT)

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States

31 U.S.C. § 3729 (2000) (FALSE CLAIMS ACT)

Government for the costs of a civil action brought to recover any such penalty or damages.

(b) KNOWING AND KNOWINGLY DEFINED. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) CLAIM DEFINED. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) EXEMPTION FROM DISCLOSURE. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) EXCLUSION. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

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CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

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(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and

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the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

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(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding,

the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the

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information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any

relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of

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section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other

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manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

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§ 3731. False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.
(b) A civil action under section 3730 may not be brought--

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.
(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.
(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo

contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

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§ 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730. Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW. The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

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§ 3733. Civil investigative demands

(A) IN GENERAL.

(1) ISSUANCE AND SERVICE. Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General

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shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) CONTENTS AND DEADLINES.

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall--

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall--

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall--

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(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil

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investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) PROTECTED MATERIAL OR INFORMATION.

(1) IN GENERAL. A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under--

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) EFFECT ON OTHER ORDERS, RULES, AND LAWS. Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any

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person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.

(1) BY WHOM SERVED. Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) SERVICE IN FOREIGN COUNTRIES. Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.

(1) LEGAL ENTITIES. Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be

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made upon a partnership, corporation, association, or other legal entity by--

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) NATURAL PERSONS. Service of any such demand or petition may be made upon any natural person by--

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(c) PROOF OF SERVICE. A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by

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registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.

(1) SWORN CERTIFICATES. The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by--

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) PRODUCTION OF MATERIALS. Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims

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law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES. Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by--

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.

(1) PROCEDURES. The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall,

personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) PERSONS PRESENT. The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) WHERE TESTIMONY TAKEN. The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) TRANSCRIPT OF TESTIMONY. When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who

may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) CERTIFICATION AND DELIVERY TO CUSTODIAN. The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS. Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General

may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) CONDUCT OF ORAL TESTIMONY.

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) WITNESS FEES AND ALLOWANCES. Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances

which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.

(1) DESIGNATION. The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) RESPONSIBILITY FOR MATERIALS; DISCLOSURE.

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

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(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe--

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such

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material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN OTHER PROCEEDINGS. Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) CONDITIONS FOR RETURN OF MATERIAL. If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and--

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any

31 U.S.C. § 3733 (2000) (FALSE CLAIMS ACT)

proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) APPOINTMENT OF SUCCESSOR CUSTODIANS. In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly--

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

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Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS.

(1) PETITION FOR ENFORCEMENT. Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) PETITION TO MODIFY OR SET ASIDE DEMAND.

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial

31 U.S.C. § 3733 (2000) (FALSE CLAIMS ACT)

district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY.

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the

31 U.S.C. § 3733 (2000) (FALSE CLAIMS ACT)

recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) PETITION TO REQUIRE PERFORMANCE BY CUSTODIAN OF DUTIES. At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district

within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) JURISDICTION. Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE. The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) DISCLOSURE EXEMPTION. Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(*l*) DEFINITIONS. For purposes of this section--

(1) the term "false claims law" means--

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or

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corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes--

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the

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inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

OPPOSITION BRIEF

(8)

No. 08-304

Supreme Court, U.S.
FILED
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In the

Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, *ET AL.*

Petitioners,

v.

UNITED STATES *EX REL.* KAREN T. WILSON,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

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RESTATED QUESTION PRESENTED

Whether a report prepared by a department of a State government or an audit report issued by an accounting firm at the request of a local government constitutes a "congressional, administrative, or Government Accounting Office report, hearing, audit or investigation" within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 32 U.S.C. § 3730(c)(4)(A).

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The respondent is the United States of America ex rel. Karen T. Wilson.

The petitioners are Graham County Soil & Water Conservation District, Gerald Phillips, Allen Dehart, Lloyd Millsaps, Cherokee County Soil & Water Conservation District, Bill Tipton, C.B. Newton, Eddie Wood, Graham County, Raymond Williams, Dale Wiggins, Lynn Cody and Keith Orr.

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Miscellaneous:

Br. for U.S. as *Amicus Curiae*,
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128 S. Ct. 119 (No. 06-1269)
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CLARIFICATION OF PETITIONERS' STATEMENT

Petitioners failed to make clear that the March 1996 audit report that petitioners argue falls within the statutory definition of a "public disclosure" set forth in 31 U.S.C. § 3730(c)(4)(A) of the False Claims Act was issued by an accounting firm at the request of Graham County following an audit performed by that accounting firm. (Op. at 11a)

REASONS FOR DENYING THE PETITION

Respondent Wilson opposes the petition for a writ of certiorari because the Fourth Circuit's decision was not "manifestly in error," but was correctly decided, and because it is premature for the Court to consider the issue in question. While there is a split in the circuits on this issue, petitioners overstate its size and depth. The issue has not sufficiently percolated in the lower courts. The Fourth Circuit decision that is the subject of the petition is the first appellate decision to consider fully all of the arguments bearing on the issue. The Fourth Circuit correctly decided it based on a comprehensive and penetrating analysis of the particular statutory language in its context, and with consideration of the structure and object of the statute. Its decision is now the definitive ruling on this issue. Prior to this Court's consideration of the issue, courts in the other circuits should be given an adequate opportunity to consider the Fourth Circuit's decision to see if the force of its reasoning lessens or even reverses the existing split in the circuits, and if any court can mount convincing counter arguments against it.

I. THE FOURTH CIRCUIT'S DECISION WAS CORRECTLY DECIDED.

In its decision, the Fourth Circuit construed "administrative" in the following pertinent language of the False Claims Act involving the "public disclosure" bar as being limited to federal administrative reports, hearing, audits or investigations:

> No court shall have jurisdiction over an action under this section based on the public disclosure of allegations or transactions . . . in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation . . . .

31 U.S.C. § 3730(e)(4). The petitioners argue incorrectly that the Fourth Circuit's decision was "manifestly in error" because it ascertained the meaning of "administrative" by reading it in context, rather than in isolation. (Pet. 22-23) However, the word "administrative" is capable of several meanings depending on the content. *See, e.g., United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 745 (3rd Cir. 1997). As this Court has noted, "context gives meaning." *United States v. Santos*, 128 S. Ct. 2020, 2024 (2008). Noting "the placement of 'administrative' squarely in the middle of a list of obviously federal sources" — "congressional" and "Government Accounting Office," the Fourth Circuit correctly applied the interpretative maxim *noscitur a sociis* ("a word is known by the company it keeps") to conclude that "'administrative' should likewise be restricted to *federal* administrative reports,

hearings, audits, or investigations."[1] (Dec. at 23-24a)

The Fourth Circuit demonstrated that its construction of the statutory provision is supported by the purpose and operation of the 1986 amendments to the False Claims Act. The 1986 amendments eliminated the government-knowledge jurisdictional bar, and furthered "the twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." (Dec. at 34-35a (citation omitted)). Petitioners' contrary construction of the statute to include state and local investigations, audits, and reports is untenable in light of those twin goals. (Id.) As the United States observed in the amicus brief it filed at the request of this Court in the *Bly-Magee* proceedings, to which petitioners cite:

> While federal fraud inquiries and their outcomes are readily available to Department of Justice attorneys, many state and local reports never come to the attention of federal authorities, and the theoretical availability of such state and local materials in no way suggests that the government is already looking into the matter.

Br. for United States as Amicus Curiae, 128 S. Ct. 1119 (filed Dec. 21, 2007). In that brief, the United States expressed its agreement with the Third Circuit's (and now the Fourth Circuit's) construction of the statute on this point. (Id. at 9-12)

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[1] The Fourth Circuit followed the Third Circuit in *Dunleavy*, which reached the same conclusion.

In an attempt to buttress their arguments, Petitioners conjure up a parade of horribles that they argue will result from the Fourth Circuit's decision. It is unconvincing.

They suggest that an opportunistic plaintiff could obtain, through a state FOIA request, the work product of ongoing investigations by state governments of suspected fraud against the United States, and then use the information to file a *qui tam* action. That such sensitive matters would ever be subject to FOIA requests under any states' laws appears farfetched.

Petitioners shed crocodile tears for the hypothetical "insider who has worked for years in gathering information in order to expose corruption" only to lose the race to the courthouse by a stranger to the fraud who files a *qui tam* action based on the revelation of fraud in a publicly disclosed state audit. (Pet. 25-6) However, the False Claims Act is designed to give little comfort to the slow and plodding whistleblower. The "race to the courthouse" promoted by the False Claim Act's "first to file" rule is called that with good reason. The "first to file" rule deliberately rewards the speedy whistleblower in order to encourage prompt reporting of fraud.

Finally, petitioners argue that the Fourth Circuit decision may discourage state and local officials from investigating suspected fraud by a local government against the United States because the investigation could subject the target of the investigation to a *qui tam* claim. This concern is overblown. First, the Fourth Circuit decision in no way affects the right of the U.S. Attorney General to bring a False Claims Act action based on that investigation. Second, other

incentives against investigating the fraud, such as the potential loss of federal grant monies by the communities or states involved, would weigh more heavily on the investigation decision than would the prospect of a *qui tam* action. The greater danger appears to be the failure of state investigators to take decisive action in response to the discovery of fraud or suspected fraud and instead, relegating the results of the investigation to a report destined for a dusty file cabinet. Petitioners' position, if adopted, would make it more likely that those reports remain in the file cabinet, unread and unused.

II. THE ISSUE HAS NOT SUFFICIENTLY PERCOLATED IN THE LOWER COURTS.

The petitioner argues that the Ninth, Eighth and Eleventh Circuits hold a view that is contrary to that of the Fourth and Third Circuits. (Pet. 11-13) However, petitioner overstates the significance and depth of this split because the Eighth Circuit did not squarely address the issue, *see Battle v. Bd. of Regents*, 468 F.3d 755 (11th Cir. 2006)(court merely assumes, without any analysis or citation to authority, that a "state audit" is an applicable public disclosure), while the Eleventh Circuit "took the middle road, not quite agreeing with the Ninth Circuit and Eleventh Circuits," (Dec. at 21a) *citing Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003) (court stated that it "did not disagree with the Third Circuit's decision in *Dunleavy*")).

Accordingly, the Ninth Circuit's decision in *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914 (9th Cir. 2006), is the *only* appellate decision that has analyzed the issue and that has arrived at a conclusion directly contrary to that of the Fourth

and Third Circuits. While the Fourth Circuit devoted twenty-one pages to addressing all facets of the issue (see Dec. 17a-38a), the Ninth Circuit addressed it in only nine paragraphs. Consequently, the Ninth Circuit's statutory construction analysis is much less robust than that of the Fourth Circuit. In fact, *Bly-Magee* failed to address or consider some of the most persuasive points raised in the Fourth Circuit decision.

The only two courts that have cited *Bly-Magee* have both rejected its reasoning and conclusions as unpersuasive. *See Wilson*, 528 F.3d 292 (4th Cir. 2008); *United States ex rel. Anti-Discrimination Ctr. Of Metro New York, Inc. v. Westchester Co.*, 495 F. Supp. 2d 375, 382 (S.D. N.Y. 2007). It appears likely that this trend will continue, particularly in light of the fact that the Fourth Circuit's contrary definitive analysis and decision is now available.

Accordingly, the issue that the Fourth Circuit decision addresses has not percolated enough in the lower courts and it is premature for the Court to address it at this time.

CONCLUSION

The petition for writ of certiorari should be denied.

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REPLY BRIEF

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No. 08-304

In the *Supreme Court of the United States*

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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November 2008

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REPLY BRIEF FOR THE PETITIONERS

In her brief in opposition, Respondent concedes that there is a circuit split on an important issue of federal law – whether a *qui tam* action is jurisdictionally barred under the False Claims Act, 31 U.S.C. § 3730(e)(4)(A), when that action is based on an audit conducted by a State or its political subdivisions. (Br. in Opp. 1) Respondent's concession is understandable given that both the United States and *qui tam* plaintiffs have repeatedly recognized the existence of this circuit split and the importance of this issue. Br. for U.S. at 37, *Hays v. Hoffman,* 325 F.3d 982 (8th Cir.) (filed May 6, 2002); Br. for U.S. as *Amicus Curiae* at 18, *United States ex rel. Bly-Magee,* 128 S. Ct. 1119 (No. 06-1269) (filed Dec. 21, 2007); Petition for Writ of Certiorari, *United States ex rel. Bly-Magee,* 128 S. Ct. 1119 (No. 06-1269) (filed Mar. 16, 2007); *see also* Pet. App. 5a-6a (noting that issue "has divided the circuit courts"). Respondent, however, attempts to downplay the magnitude of the circuit split. She also argues that this Court need not grant certiorari because the decision below was correctly decided. Respondents' arguments are unavailing.[1]

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[1] Respondent notes that one of the audits at issue (the March 1996 audit by Graham County) was performed by an independent auditor hired by the County, rather than a county employee. (Br. in Opp. 1) The fact that this audit was conducted by an independent auditor retained by the County versus a county employee is immaterial. *See, e.g., United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 174-75 (5th Cir. 2004); *Hays v. Hoffman*, 325 F.3d 982, 988-89 (8th Cir. 2003).

I. THE CIRCUIT COURTS ARE INTRACTABLY SPLIT ON AN IMPORTANT ISSUE OF FEDERAL LAW.

Despite the significant split among the circuits, Respondent argues that this Court should not grant certiorari and should await to see if the decision below will result in all other circuits eventually falling in line behind the Fourth Circuit. (Br. in Opp. 1) Respondent's approach is unrealistic.

Six circuits have expressly stated how they would construe this provision of the public disclosure bar. Three circuits have embraced the construction advocated by Petitioners. *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917-18 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 1119 (2008); *Battle v. Bd. of Regents*, 468 F.3d 755, 762 (11th Cir. 2006); *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003); *see also United States ex rel. Fried v. W. Indep. Sch. Dist.*, 527 F.3d 439 (5th Cir. 2008) (indicating that state reports should be treated the same as federal reports).[2] Three

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[2] Respondent argues that the Eighth Circuit "did not squarely address" the issue raised by the petition. (Br. in Opp. 5) The Eighth Circuit, however, expressly held that state audits fall within the scope of 31 U.S.C. § 3730(e)(4)(A) when a state audit is conducted as part of a cooperative federal-state program. *Hays*, 325 F.3d at 988. That holding is in direct conflict with the decision of the Fourth Circuit. Respondent also attacks the Eleventh Circuit's decision in *Battle* as lacking "analysis or citation

circuits have embraced the construction advocated by Respondent. *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292 (4th Cir. 2008); *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717, 725 (6th Cir. 1999) (dicta); *United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 745 (3d Cir. 1997). The Fourth Circuit's decision has simply deepened the split that already existed. Moreover, with the Fourth Circuit decision, the split is no longer lop-sided. Thus, it is less likely that the circuit split could be resolved without this Court's intervention.

Respondent asserts that the Fourth Circuit's decision is so well reasoned that the Eighth, Ninth and Eleventh Circuits may eventually fall in line with the Fourth Circuit. In making this argument, however, Respondent overlooks the fact that the Fourth Circuit clearly struggled with how 31 U.S.C. § 3730(e)(4)(A) should be read. The Fourth Circuit expressly stated: "Although we ultimately disagree with [defendants'] approach to the statute, we must admit that there is some force to the argument." (Pet. App. 28a) The Fourth Circuit further conceded that the meaning of the statute was "murky" and could only be resolved with a "secret decoder ring." (Pet. App. 32a) The

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to authority." (Br. in Opp. 5) Although Respondent may not like the outcome of the *Battle* decision, the holding of the Eleventh Circuit is clear and unambiguous and has been repeatedly followed in the Eleventh Circuit. *See, e.g., McElmurray v. Consol. Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1253 (11th Cir. 2007).

Fourth Circuit's decision expressly recognizes that the issue presented by this petition is a close one. Accordingly, Respondent's belief that the Fourth Circuit's decision may result in this long-standing split dissipating is not well founded.

Industry groups, States and municipalities are vitally concerned that this important issue be resolved now because it is unlikely that this entrenched conflict in the circuits will disappear. Amici Br. of U.S. Chamber of Commerce *et al.* 10-21; Amici Br. of PhRMA *et al.* 4-14; Amici Br. of Washington Legal Found. *et al.* 4-22; States' Amici Br. 2-8; Amici Br. of Nat'l League of Cities 2-16. Further percolation would not facilitate this Court's consideration of the merits of this issue.

II. THE FOURTH CIRCUIT ERRED IN ITS CONSTRUCTION OF THE FALSE CLAIMS ACT.

Respondent's Brief in Opposition rests primarily on an argument that the Fourth Circuit's decision was correctly decided. (Br. in Opp. 2-5) The Fourth Circuit's decision, however, is inconsistent with both the language of the False Claims Act and congressional intent.

The False Claims Act expressly provides that a *qui tam* action is jurisdictionally barred if it is based on an "administrative . . . report, . . . audit, or investigation." 31 U.S.C. § 3730(e)(4)(A) (2000). As the Fourth Circuit recognized, the word "administrative" is not limited to federal agencies – the

word, in normal parlance, would also include state agencies. (Pet. App. 22a) Rather than relying on the express language of the statute, the Fourth Circuit turned to an obscure principle of statutory construction (*noscitur a sociis*) even though that principle has no applicability when, as here, there is no common feature that can be extrapolated from the statutory list. Moreover, by re-writing the statute, the decision below has produced multiple anomalies – anomalies that Congress should not be presumed to have intended. Respondent's effort to address these judicially created anomalies is not persuasive.

Respondent argues that it is unlikely that *qui tam* plaintiffs will bring parasitic actions based on state government reports, because it is "farfetched" that any State's FOIA laws would result in investigations being available to the general public. (Br. in Opp. 4) Respondent's very actions in this case prove the opposite. Here, the March 1996 audit asserted that the work at issue should have been sent out for bids. That report was readily available to the public under North Carolina's Public Records Act. N.C. Gen. Stat. § 132-1 to -10 (2007). Respondent learned of the information set out in the March 1996 audit and subsequently brought a *qui tam* action in which she claims the payments were false and fraudulent because the work was not sent out for bids.

Respondent also argues that this Court should not be concerned that, under the Fourth Circuit's decision, a plaintiff with no knowledge of a fraudulent payment (other than what is set out in a state audit) may win the race to the courthouse, thereby foreclosing a *qui*

tam action brought by an insider. (Br. in Opp. 4) Respondent argues that it is speculative to assume that under the first-to-file rule, 31 U.S.C. § 3730(b)(5) (2000), a hypothetical insider will be barred from bringing a *qui tam* action because an opportunistic plaintiff learns of wrongdoing through a government report and files an action based on such a report. In making this argument, Respondent ignores the fact that 19 States have filed an amicus brief with the Court, emphasizing that the Fourth Circuit's decision poses a very real danger for States when they are acting as *qui tam* plaintiffs. States' Amici Br. 6. The anomaly created by the Fourth Circuit's decision is neither hypothetical nor speculative.

The purpose of the public disclosure bar is to prevent parasitic lawsuits. *See, e.g., United States ex rel. Springfield Terminal Ry. v. Quinn,* 14 F.3d 645, 649 (D.C. Cir. 1994) (purpose is to prevent suits by "opportunistic plaintiffs who have no significant information to contribute of their own"). Congress intended that a *qui tam* plaintiff who does not have independent knowledge of the wrongdoing, but simply relies on public information, should not be rewarded based on the work of others who actually disclosed the fraud. Allowing a *qui tam* plaintiff who does not stand as an original source to build a false claims action on state administrative reports encourages the filing of parasitic actions. *See, e.g.*, Natalie R. Gregory, *State and Local Government Documents as "Public Disclosures" under the False Claims Act: Walking the Tightrope between Parasitic Litigation and Legitimate Claims*, 32 S. ILL. U. L.J. 699, 722 (2008) (concluding that unless state and local government reports and

audits are included within scope of public disclosure bar, False Claims Act will be subject to abuse "in the form of frivolous or parasitic litigation"). Accordingly, the decision of the Fourth Circuit should be reversed.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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November 2008

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AMICUS CURIAE BRIEF

No. 08-304

In the Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The False Claims Act (FCA) provides that no court has jurisdiction over a *qui tam* action "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media" unless the relator "is an original source of the information." 31 U.S.C. 3730(e)(4)(A). The question presented is whether a state or local government report or audit qualifies as a "congressional, administrative, or Government Accounting Office report * * * [or] audit" within the meaning of the FCA.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should grant the petition for a writ of certiorari.

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, provides for the imposition of civil penalties and treble damages against any person who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The Attorney General

may bring a civil action if he finds that a person has committed a violation. 31 U.S.C. 3730(a). Alternatively, a private person (known as a relator) may bring a *qui tam* civil action "for the person and for the United States Government." 31 U.S.C. 3730(b)(1). The government may intervene and take over the relator's action. 31 U.S.C. 3730(b)(2)-(4). If the government declines to intervene, the relator conducts the litigation. 31 U.S.C. 3730(c)(3). If a *qui tam* action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

The FCA's "public disclosure" provision states:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office [(GAO)] report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.[1]
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an

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[1] Section 3730(e)(4)(A) as enacted refers to the "Government Accounting Office." Both the compilers of the United States Code and the courts have construed that term to refer to the *General* Accounting Office (now renamed the Government Accountability Office). See 31 U.S.C. 3730 n.2; Pet. App. 19a n.4; *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 387 (3d Cir. 1999), cert. denied, 529 U.S. 1018 (2000).

> action under this section which is based on the information.

31 U.S.C. 3730(e)(4) (footnote omitted).

2. In February 1995, after a storm caused extensive flooding and erosion in western North Carolina, petitioners Graham County and Cherokee County applied for aid under the Emergency Watershed Protection Program (EWP Program), a federal disaster relief program. The Natural Resources Conservation Service (NRCS), an agency of the United States Department of Agriculture (USDA), administers the EWP Program. Pet. App. 7a. The counties and the NRCS entered into contracts under which the counties would perform, or hire a contractor to perform, necessary clean-up and repairs, with USDA bearing 75% of the costs. *Ibid.* The Graham and Cherokee County soil and water conservation districts administered the contracts. *Ibid.*

Respondent Karen Wilson is a former secretary at petitioner Graham County Soil and Water Conservation District (Graham Conservation District). Pet. App. 9a. In the summer of 1995, respondent raised concerns with county and conservation district officials about alleged fraud by petitioners in connection with the EWP Program. *Id.* at 9a-10a. In December 1995, respondent sent a letter reporting her allegations to the NRCS, and in November 1996 she met with agents from the USDA Inspector General's office. *Ibid.*

Earlier in 1996, Graham County had begun its own investigation. Pet. App. 11a. In March 1996, Graham County asked an accounting firm to perform an audit regarding the County's administration of the EWP Program contracts (County Report). *Ibid.* The County Report identified numerous issues of concern, including the decision to hire a Graham Conservation District em-

ployee to perform EWP Program contract work and the failure to seek bids for that work. *Id.* at 9a, 11a.

In May 1996, the North Carolina Department of Environment, Health and Natural Resources issued a report (DEHNR Report) that discussed the Graham Conservation District's non-compliance with various requirements of the North Carolina Agricultural Cost Sharing Program. Pet. App. 97a. Petitioners assert that the County Report and the DEHNR Report are public records under North Carolina law, which are "readily accessible to the general public." Pet. 5 (citing N.C. Gen. Stat. §§ 132-1 to 132-10 (2007)).

3. In 2001, respondent filed suit in federal district court, alleging that petitioners had violated the FCA by making numerous false claims for payment under the EWP Program. Pet. App. 11a, 48a-52a. Respondent asserted, *inter alia*, that petitioners had failed to seek bids for EWP Program contract work and had awarded such work to a Graham Conservation District employee who had a conflict of interest. *Id.* at 12a.[2] The United States declined to intervene, and respondent proceeded with the litigation. *Id.* at 48a n.1.

The district court held that it lacked jurisdiction over respondent's FCA claims. Pet. App. 95a-105a. The court ruled that the County Report constituted a public disclosure of respondent's allegations that the Graham Conservation District had failed to solicit bids for EWP

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[2] Respondent also asserted a retaliation claim. Pet. App. 5a n.1. The court of appeals dismissed the retaliation claim as time-barred on remand from this Court's decision in *Graham County Soil & Water Conservation District* v. *United States ex rel. Wilson*, 545 U.S. 409 (2005) (FCA six-year statute of limitations does not apply to retaliation claims under Section 3730(h); court of appeals should apply most closely analogous state statute of limitations).

Program contract work and had improperly hired an employee to perform such work. *Id.* at 95a-96a. The court found that respondent "ha[d] not refuted" the conclusions that the County Report had been publicly disclosed, that she had relied on the report, and that she was not an original source of the allegations. *Id.* at 96a. The court also determined that the DEHNR Report had publicly disclosed allegations of Graham County's improprieties in connection with the North Carolina Agricultural Cost Sharing Program, and that respondent was not an "original source" of such allegations. *Id.* at 97a-98a.

In the alternative, the district court granted summary judgment to petitioners on the merits of respondent's FCA claims. Pet. App. 106a-152a.

4. The court of appeals vacated and remanded. Pet. App. 1a-46a. The court observed that a conflict among the circuits existed on the question whether the phrase "congressional, administrative, or Government Accounting Office report[s], hearing[s], audit[s], or investigation[s]" encompasses administrative reports issued by a State or county. *Id.* at 18a-21a (quoting 31 U.S.C. 3730(e)(4)(A)). Whereas the Ninth and Eleventh Circuits have concluded that the FCA "public disclosure" bar encompasses non-federal reports and audits, the Third Circuit has held that only federal reports and audits fall within the scope of Section 3730(e)(4)(A). *Id.* at 21a (citing *United States ex rel. Bly-Magee* v. *Premo*, 470 F.3d 914, 918-919 (9th Cir. 2006), cert. denied, 128 S. Ct. 1119 (2008); *Battle* v. *Board of Regents*, 468 F.3d 755, 762 (11th Cir. 2006); *United States ex rel. Dunleavy* v. *County of Del.*, 123 F.3d 734, 745 (3d Cir. 1997)).

The court of appeals agreed with the Third Circuit that the second clause of the public disclosure provision

encompasses only *federal* audits, reports, hearings and investigations. Pet. App. 22a-37a. The court noted that the terms "congressional" and GAO refer to "clearly *federal* sources." *Id.* at 23a. The court of appeals recognized that "there is nothing inherently federal about the word 'administrative.'" *Ibid.* The court concluded, however, that, for purposes of Section 3730(e)(4)(A), "[t]he placement of 'administrative' squarely in the middle of a list of obviously federal sources strongly suggests that 'administrative' should likewise be restricted to *federal* administrative reports, hearings, audits, or investigations." *Id.* at 23a-24a.

The court of appeals further found that the relevant legislative history supported its interpretation. Pet. App. 34a-35a. The court explained that when Congress amended the FCA in 1986, it enacted the current "public disclosure" bar to "further the twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *Id.* at 35a (internal quotations omitted). The court reasoned that the federal government probably would not learn about state or local audits or investigations, and that including such audits and investigations within the scope of the "public disclosure" bar would therefore frustrate Congress's purpose. *Id.* at 36a.

Accordingly, the court of appeals held that neither the County Report nor the DEHNR Report fell within the scope of the "public disclosure" bar. Pet. App. 37a. The court remanded to the district court to determine whether a USDA report regarding administration of the

EWP Program contracts had been publicly disclosed.[3] The court of appeals further held that the district court had erred by addressing the merits after finding that it lacked jurisdiction. The court of appeals therefore vacated the district court's decision on the merits. *Id.* at 44a-45a.

DISCUSSION

The court of appeals correctly construed the second clause of the "public disclosure" bar contained in 31 U.S.C. 3730(e)(4)(A). The court's decision, however, deepens a pre-existing circuit conflict regarding whether state and local administrative audits and reports fall within the scope of the FCA's "public disclosure" provision. This Court should grant the petition for a writ of certiorari to resolve the split among the circuits on an important legal issue affecting the federal courts' jurisdiction over FCA *qui tam* actions.

A. Section 3730(e)(4)(A) Does Not Encompass Public Disclosures Made In State Or Local Government Administrative Audits Or Reports

1. Section 3730(e)(4)(A) identifies three categories of "public disclosure[s]" that can trigger the FCA's jurisdictional bar: (1) disclosures in "a criminal, civil, or administrative hearing"; (2) disclosures in "a congressional, administrative, or [GAO] report, hearing, audit, or investigation"; and (3) disclosures in "the news media." 31 U.S.C. 3730(e)(4)(A). The petition for a writ of certiorari presents the question whether the reference to "ad-

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[3] Petitioners concede that the USDA report cannot bar respondent's "principal claim" because it did not address whether the conservation districts were required to solicit bids for EWP Program contract work. Pet. 6 n.2.

ministrative * * * report[s]" or "audit[s]" in the second of those categories (Category 2) encompasses disclosures in state and local reports, hearings, audits, and investigations, or rather is limited to disclosures made in federal government proceedings.

As the court of appeals correctly held, Category 2 is properly construed as limited to disclosures made in a *federal* report, hearing, audit, or investigation. "Statutory language must be read in context and a phrase 'gathers meaning from the words around it.'" *Jones* v. *United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)); see *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) ("doctrine of *noscitur a sociis*" serves "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words"). Insofar as Category 2 applies to congressional and GAO reports, its coverage is unambiguously limited to disclosures made in federal proceedings. It is therefore unlikely "that the drafters of this provision intended the word 'administrative' to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character." *United States ex rel. Dunleavy* v. *County of Del.*, 123 F.3d 734, 745 (3d Cir. 1997). Indeed, "the exclusively federal nature of the terms 'congressional' and '[General] Accounting Office' is immediately apparent, and these clearly federal terms bookend the not-so-clearly federal term, thus providing a very strong contextual cue about the meaning of 'administrative.'" Pet. App. 25a.

To read the term "administrative" more broadly than the words surrounding it would create an unwarranted anomaly. Such a reading, for example, would put a State's legislature on a lesser footing than a local county

administrator. Section 3730(e)(4)(A) unambiguously provides that, with respect to legislative bodies, only a report or investigation of the *federal* legislature—Congress—qualifies as a public disclosure. Because state legislative reports are excluded from the scope of Section 3730(e)(4)(A), Congress did not likely intend to mandate different treatment for reports by a state or local "administrative" body.

That interpretation is consistent with the exclusively federal focus of the FCA more generally, which provides a remedy only for false claims against "the United States Government." 31 U.S.C. 3729(a)(1). Suit may be brought by the United States Attorney General or, in certain circumstances, by *qui tam* relators who sue "for the United States Government" and collect a portion of the federal government's recovery, 31 U.S.C. 3730(b)(1) and (d). To the extent that state or local governmental entities may become parties to actions under Section 3730, they do so in the same capacity as private individuals can—as defendants or as *qui tam* relators. See, *e.g.*, *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 134 (2003) (local governments are subject to suit as "person[s]" under 31 U.S.C. 3729); cf. *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 778-787 (2000) (State not subject to suit by *qui tam* relator); *id.* at 787 n.18 (noting, without resolving, the question whether "States can be 'persons' for purposes of *commencing* an FCA *qui tam* action under § 3730(b)"). The exclusively federal focus of the statute's governmental references is also seen in the use, throughout Sections 3729 and 3730 (including in Subparagraph (B) of Section 3730(e)(4)), of the term "the Government," singular and with a capital "G," to refer exclusively to the *federal* government. See, *e.g.*, 31

U.S.C. 3729(a)(2)-(7); 31 U.S.C. 3730(b)(1)-(3), (e)(2)(A), (3) and (4)(B). Given the exclusively federal character of all these other governmental references, including the references to Congress and the GAO in the same clause at issue here, the reference to governmental "administrative * * * report[s]" "or audit[s]" in Section 3730(e)(4)(A) should not be read to sweep in reports or audits by state or local governmental entities.

2. The purposes and history of the "public disclosure" bar also support construing Category 2 (and Category 1, for that matter, see pp. 17-18, *infra*) as limited to federal proceedings. The "public disclosure" bar is intended to "further the twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." Pet. App. 35a (internal quotations omitted). Consistent with those goals, the bar should apply only to documents that demonstrate that the federal government is already on the trail of the alleged fraud. Documents prepared by state and local governments do not give rise to any such inference.

a. Since its original enactment during the Civil War, the FCA has authorized *qui tam* relators to sue for the United States and for themselves, and to obtain a share of the government's recovery if the suit is successful. See *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 551-552 (1943). Such private actions supplement government enforcement efforts, and thereby deter fraud, by harnessing "the strong stimulus of personal ill will or the hope of gain." *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) (quoting *United States* v. *Griswold*, 24 F. 361, 366 (D. Or. 1885)).

Congress twice has amended the FCA's *qui tam* provisions in an effort to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Springfield Terminal Ry.*, 14 F.3d at 649. Early in the FCA's history, "the statute was abused by qui tam suits brought by private plaintiffs who had no independent knowledge of fraud," *Seal 1* v. *Seal A*, 255 F.3d 1154, 1158 (9th Cir. 2001), cert. denied, 535 U.S. 1017 (2002), yet could receive one-half of any judgment. In *Marcus*, for example, this Court held that the FCA in its then-current form authorized a *qui tam* suit brought by a relator who had derived his allegations of fraud from a prior federal indictment. See 317 U.S. at 545-548.

In 1943, shortly after the *Marcus* decision, Congress amended the FCA to divest the courts of jurisdiction over *qui tam* suits that were "based on evidence or information the Government had when the action was brought." 31 U.S.C. 3730(b)(4) (1982).[4] In that context, the reference to "the Government" unambiguously was limited to the federal government, which could choose to bring the suit itself based on the information in its possession. In the 1980s, Congress concluded that the absolute bar against *qui tam* suits based on information already in the federal government's possession precluded an unduly broad range of potentially valuable suits. See *Springfield Terminal Ry.*, 14 F.3d at 650-651.

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[4] Although the Senate version of the 1943 amendments contained an exception to the jurisdictional bar for suits brought by relators who were the "original source" of the government's information, that provision was dropped from the enacted version without explanation. S. Rep. No. 345, 99th Cong., 2d Sess. 12 (1986).

In 1986, as part of a broader reform of the FCA, Congress replaced the government-knowledge bar with the present Section 3730(e). The applicability of the current provision turns on whether the federal government is already acting, or likely to act, on the alleged fraud, such as where the government has publicly disclosed the relevant information in the course of exposing, investigating, prosecuting, or otherwise pursuing the allegations of fraud. At the same time, Congress carved out an exception to the bar for situations in which the relator was the "original source" of the information about the fraud.

The legislative history of the 1986 amendment confirms that the governmental proceedings referred to in the "public disclosure" bar are exclusively federal. Although the amendments were directed at narrowing the then-existing bar, which encompassed all knowledge possessed by the federal government, Congress did not intend to alter the bar's exclusive focus on whether the *federal* government is able to pursue the fraud unaided by a *qui tam* relator.

The uniquely federal focus of the amendment is evidenced by the text of the original House and Senate bills. The bill reported by the House Judiciary Committee would have barred *qui tam* actions that are (1) "based on specific evidence or specific information *which the Government* disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding," (2) "based on specific information disclosed during the course of a congressional investigation," or (3) "based on specific public information disseminated by any news media." H.R. Rep. No. 660, 99th Cong., 2d Sess. 42 (1986) (H.R. Rep. 660) (proposed 31 U.S.C. 3730(b)(5)(A)) (emphasis added). The term "adminis-

trative * * * proceedings" here could have meant only federal administrative proceedings given the provision's reference to "information which *the Government* disclosed" in such proceedings. *Id.* at 42 (proposed 31 U.S.C. 3730(b)(5)(A)) (emphasis added)). The bill passed by the House of Representatives contained this provision. See 132 Cong. Rec. 22,330, 22,331, 22,345 (1986).[5]

The bill reported by the Senate Judiciary Committee contained a parallel, though differently worded, provision. It provided that a person could not bring a *qui tam* action "within six months of the disclosure of specific information relating to such allegations or transactions in a criminal, civil, or administrative hearing, a congressional or Government Accounting Office report or hearing, or from the news media." S. Rep. No. 345, 99th Cong., 2d Sess. 43 (1986) (S. Rep. 345) (proposed 31 U.S.C. 3730(e)(4)). Although the Senate bill broadened the House bar by making it applicable regardless of who had made the disclosure during the governmental proceeding, the focus on federal proceedings remained, as evidenced by the reference to congressional or GAO reports.

After the Senate bill was reported, the Senate adopted a substitute version of the bill. See 132 Cong. Rec. at 20,530. That provision contained a "public disclosure" bar that was identical for present purposes to 31 U.S.C. 3730(e)(4) as finally enacted. See 132 Cong. Rec. at 20,531 (proposed 31 U.S.C. 3730(e)(5)). In describing the substitute bill's *qui tam* provisions, Senator Grass-

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[5] The House bill contained an exception for situations in which "the Government" was aware of the information for at least six months before the relator filed suit but did not initiate a civil action within that period. H.R. Rep. 660, at 42 43 (proposed 31 U.S.C. 3730(b)(5)(B)).

ley, the principal sponsor, explained that "the term 'Government' in the definition of original source"—*i.e.*, in that definition's requirement that the relator must have voluntarily informed "the Government" of the allegations prior to suit—"is meant to include any Government source of disclosures cited in[S]ubsection (5)(A) [Subsection (4)(A) as enacted]; that is Government includes Congress, the General Accounting Office, any executive or independent agency as well as all other governmental bodies that may have publicly disclosed the allegations." *Id.* at 20,536. This explanation makes clear that Paragraphs (A) and (B) in Section 3730(e)(4) are to be read together and that the public disclosure bar in Paragraph (A) is triggered only by a disclosure made by a component of the *federal* "Government" referred to in Paragraph (B). That interpretation is, as discussed above, see pp. 12-13, *supra*, also consistent with the federal focus of the bill passed by the House, which was expressly limited to "information which the Government disclosed" in one of the enumerated governmental fora. H.R. Rep. 660, at 42 (proposed 31 U.S.C. 3730(b)(5)(A)).

b. Construing the "public disclosure" bar as limited to disclosures in federal proceedings furthers Congress's purpose "to encourage more private enforcement suits," S. Rep. 345, at 23; see *Chandler*, 538 U.S. at 133 (explaining that the 1986 FCA amendments "enhanced the incentives for relators to bring suit"), whereas petitioner's interpretation would undermine that purpose. By replacing the prior government-knowledge bar with current Section 3730(e)(4), Congress narrowed the scope of the bar by "allow[ing] private parties to sue even based on information already in the Government's possession." *Ibid.*; see *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 950

(1997) (1986 amendments "permitt[ed] actions by an expanded universe of plaintiffs"). Interpreting Section 3730(e)(4)(A) to encompass state and local reports, however, would significantly *expand* the jurisdictional bar, precluding *qui tam* suits based on information that has never been in the federal government's possession and that is unlikely to come to its attention, even though such suits would have gone forward under the pre-1986 version of the statute. "Because the federal government is unlikely to learn about state and local investigations," construing the public disclosure bar to encompass state and local reports would "discourage private actions that the federal government is *not* capable of pursuing on its own, thus frustrating rather than furthering the goals of the FCA." Pet. App. 36a.

Against this background, Category 2 in Section 3730(e)(4)(A) is properly construed, consistent with the most natural reading of its text, as limited to federal reports, hearings, audits, and investigations. That interpretation better serves the "twin goals" (*Springfield Terminal Ry.*, 14 F.3d at 651) of Section 3730(e)(4)—*i.e.*, promoting *qui tam* actions alleging possible fraud that the federal government is not publicly pursuing or may even be unaware of, while precluding relator suits when the government is already on the way toward prosecuting its own suit. While federal fraud inquiries and their outcomes are readily available to Department of Justice attorneys, many state and local reports and investigations never come to the attention of federal authorities (see Pet. App. 35a-36a), and the theoretical availability of such materials in no way suggests that the federal government is already looking into the matter. Barring suits by relators based on disclosures from such state and local sources would therefore frustrate Congress's

effort to strike an appropriate balance between encouraging private citizens to expose fraud unknown to or unaddressed by the federal government and preventing suits by would-be relators who add nothing to the government's own enforcement efforts.

Construing Section 3730(e)(4)(A) as encompassing state and local government reports is particularly problematic where, as here, the county is both the source of the purported disclosure and a defendant in the *qui tam* suit. If the County Report were to qualify as a public disclosure, Graham County would effectively have shielded itself from a *qui tam* suit through a report not readily available to the federal government. As the Third Circuit has noted, "[i]f state and local government reports were treated as administrative reports under the Act, the jurisdictional bar might be invoked through information submitted by those bent on convincing a federal agency that no fraud, in fact, was occurring." *Dunleavy*, 123 F.3d at 745. This case, in other words, demonstrates how petitioners' proposed interpretation would frustrate Congress's intent to encourage *qui tam* actions in circumstances where the federal government is unlikely to learn of the alleged fraud.

3. Petitioners urge (Pet. 24-25) that the court of appeals' interpretation of Category 2 as limited to federal reports and investigations creates anomalies because the other categories of "public disclosure" that implicate the bar do not require federal involvement. Category 1—"criminal, civil, or administrative hearing[s]," 31 U.S.C. 3730(e)(4)(A)—has been construed as encompassing state and local proceedings, see Pet. App. 26a (citing cases), and Category 3—"the news media," 31 U.S.C. 3730(e)(4)(A)—is wholly non-governmental. Petitioners are mistaken with respect to the scope of Category 1,

and they misunderstand the reason for Congress's inclusion of Category 3.

a. The court of appeals noted (Pet. App. 28a) a seeming tension between its recognition that Category 2 should be limited to *federal* sources of disclosures in light of the "inherently federal language chosen by Congress" in Category 2, *id.* at 30a-31a, and earlier circuit precedent holding that Category 1 "encompass[es] state as well as federal hearings," *id.* at 26a. In the view of the United States, the source of any tension is the court of appeals' erroneous construction of Category 1 to encompass state judicial and administrative hearings.

As explained above, see p. 8, *supra*, the adjectives "congressional" and "[General] Accounting Office" in Category 2 strongly suggest that the word "administrative" in that same phrase refers to *federal* administrative reports. If (as petitioners argue) it would be anomalous to treat one category as encompassing non-federal sources and the other category as excluding them, the solution would not be to *expand* the coverage of Category 2, which contains the more explicit textual evidence of Congress's intent, but to read Category 1, which might appear in isolation to cover non-federal hearings, as limited instead to federal proceedings. Just as the word "administrative" *within* Category 2 should be construed in light of the accompanying adjectives "congressional" and "[General] Accounting Office," the scope of Category 1 should be determined in light of Category 2's federal focus as well as the federal focus of the Section as a whole. See *Jones*, 527 U.S. at 389 (statutory

"phrase 'gathers meaning from the words around it'") (quoting *Jarecki*, 367 U.S. at 307).[6]

b. Petitioners also suggest that it would have been inconsistent for Congress to include "the news media," 31 U.S.C. 3730(e)(4)(A), among the sources of disqualifying public disclosures, while excluding "a formal audit conducted by an elected state official that is widely disseminated." Pet. 25. As noted above, the 1986 amendments to the public disclosure bar were intended to permit a broader class of *qui tam* suits, while barring those where the federal government was on the trail of the fraud (except where the suit was brought by an "original source"). Although a media disclosure does not demonstrate that the federal government knew of the alleged fraud *before* the disclosure, it is the type of disclosure—because of its widely dispersed nature—that almost certainly will come to the federal government's attention when it concerns fraud on the federal fisc. Indeed, media exposés are often part of an effort to urge the government into action.

By contrast, a "public disclosure" of a governmental fraud investigation occurs whenever that investigation is disclosed to even a single "stranger to the fraud" outside the government, so long as the outsider is not precluded from further disseminating the information. See,

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[6] The court of appeals stated that its construction avoided what it believed would otherwise be a redundancy in the statute's reference to administrative hearings in both Categories 1 and 2. There is, however, no redundancy. Category 1—"criminal, civil, or administrative hearing[s]," 31 U.S.C. 3730(e)(4)(A)—refers to adjudicative proceedings, whereas Category 2—"congressional, administrative, or [GAO] report[s], hearing[s], audit[s], or investigation[s]," *ibid.*—refers to legislative or oversight proceedings, such as an administrative rule-making proceeding or an investigation carried out by an agency's inspector general.

e.g., *United States ex rel. Fine* v. *MK-Ferguson Co.*, 99 F.3d 1538, 1544-1545 (10th Cir. 1996); *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 322-323 (2d Cir. 1992). If the investigation so disclosed is being conducted by the federal government, then application of the "public disclosure" bar serves Congress's purposes. If, however, the investigation in question was conducted by the local or state governmental entity that is itself potentially liable under the FCA, as is true of the County Report in this case, its disclosure to a single member of the public provides no assurance that the federal government is likely to become aware of the fraud. Under these circumstances, application of the public disclosure bar would frustrate, rather than further, Congress's purpose.[7]

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[7] Respondent contended in the court of appeals that neither the County Report nor DEHNR Report had been "publicly" disclosed because they were provided only to governmental officials. See Pet. App. 17a. The court of appeals did not decide whether the dissemination of the reports had actually been limited in that manner because it held the "public disclosure" bar inapplicable to state and local reports. Petitioners contend (Pet. 5) that whether the documents were actually disclosed beyond the government is legally irrelevant because a "public disclosure" occurs whenever information is placed in government files that are subject to applicable open-records laws. The United States disagrees with petitioners' legal assertion. In the view of the United States, even when information is contained in federal records that are subject to potential release under the Freedom of Information Act, 5 U.S.C. 552, the FCA's "public disclosure" bar is not triggered unless and until an *actual* release of that information outside the government occurs. Thus, if respondent were clearly correct that the reports were not disclosed beyond government officials, that fact would constitute an independent basis for affirming the court of appeals' conclusion that the "public disclosure" bar does not preclude respondent's action and might

B. Review Is Warranted Because The Petition Presents An Important Question On Which The Circuits Are In Conflict

Although the court of appeals' holding is correct, it deepens a pre-existing conflict among the circuits that warrants this Court's resolution. Consistent with the decision below, the Third Circuit has held that Category 2 is limited to disclosures in federal sources. *Dunleavy*, 123 F.3d at 745. In contrast, the Ninth and Eleventh Circuits have construed Category 2 to encompass disclosures made in non-federal reports and audits. *United States ex rel. Bly-Magee* v. *Premo*, 470 F.3d 914, 918-919 (9th Cir. 2006), cert. denied, 128 S. Ct. 1119 (2008); *Battle* v. *Board of Regents*, 468 F.3d 755, 762 (11th Cir. 2006). The Eighth Circuit has also ruled that state reports and audits can fall within the scope of the "public disclosure" provision "if they are prepared * * * by or at the behest of a state agency that administers the federal grant program under 'significant Federal regula-

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therefore make this case a poor vehicle for the Court to resolve the question presented.

The record below contains evidence, however, that would support a conclusion that the allegations in the County Report and DEHNR Report were in fact disclosed to members of the public beyond governmental officials. See 10/17/06 Dep. of Karen Wilson, Ex. GC1 (minutes of May 21, 1996, public Graham Conservation District meeting at which relator discussed allegations in County Report that she had obtained); *ibid.* (minutes of same, reflecting oral request by relator's husband and others of DEHNR Report); N.C. Gen. Stat. § 132-6(a) and (b) (2007) (permitting disclosure of public records pursuant to oral request). Thus, the Court could consider the question presented on the factual assumption that the reports were disclosed to the "public" and, if the Court were to conclude that state and local reports *are* within the scope of Category 2, it could remand for the court of appeals to resolve in the first instance whether those reports were, in fact, disclosed publicly.

tion and involvement.'" *Hays* v. *Hoffman*, 325 F.3d 982, 989 (quoting S. Rep. 345, at 22), cert. denied, 540 U.S. 877 (2003).[8]

This case provides an appropriate opportunity for the Court to resolve that persistent and growing conflict among the circuits.[9]

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[8] In addition, the Fifth Circuit has indicated in *dicta*, without analysis, that Category 2 could encompass materials received in response to a state-law public-records request. *United States ex rel. Fried* v. *West Indep. Sch. Dist.*, 527 F.3d 439, 442 (2008).

[9] As the Fourth Circuit acknowledged, see Pet. App. 40a-41a, its standard for determining whether a relator's claims are "based upon" a public disclosure differs from that of the majority of circuits. The Fourth and Seventh Circuits have ruled that a *qui tam* action is "based upon" a public disclosure "*only* if the *qui tam* plaintiff's allegations were actually *derived from* the public disclosure itself." *Ibid.* In contrast, eight courts of appeals have held, consistent with the position of the United States, "that a *qui tam* action is 'based upon' a public disclosure when the supporting allegations are the same as those that have been publicly disclosed . . . regardless of where the relator obtained his information." *United States ex rel. Fowler* v. *Caremark RX, L.L.C.*, 496 F.3d 730, 737 (7th Cir. 2007) (internal quotation marks omitted) (describing, while rejecting, majority rule and collecting cases), cert. denied, 128 S. Ct. 1246 (2008).

The Court need not resolve the disagreement among the circuits on that question in order to decide this case. Although the court of appeals did not regard the district court as having made an explicit factual finding that respondent's complaint was "based upon" the County Report under the Fourth Circuit's more restrictive standard, Pet. App. 41a, the district court did note evidence that respondent had access to the report, and it stated that respondent "has relied on this document," *id.* at 96a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES EX REL. KAREN T. WILSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN HEALTH CARE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amicus curiae the Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the United States.[1] A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the Nation's business community, including cases before this Court raising important questions under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733.

Amicus curiae the American Health Care Association (AHCA) is the national representative of nearly 11,000 non-profit and proprietary facilities dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly and disabled citizens who live in nursing facilities, assisted living residences, subacute centers, and homes for persons with mental retardation and de-

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission. Both petitioners and respondent have consented to the filing of this brief. Petitioners have filed a letter with the Clerk granting blanket consent to any party wishing to file a brief in support of either petitioners or respondent, and respondent's written consent to the filing of this brief has been filed with the Clerk. Counsel of record for petitioners and respondent received notice of *amici*'s intent to file this brief more than ten days before the due date.

velopmental disabilities. One way in which AHCA promotes the interests of its members is by participating as an *amicus curiae* in cases with far-ranging consequences for its members, including cases brought under the FCA that raise significant legal questions as to how the statute should be applied.

The Chamber, AHCA and their respective members have a substantial interest in this case. The FCA provides a *qui tam* relator or the Federal Government with a cause of action against "[a]ny person" who, among other things, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). Save for two exceptions, no proof of specific intent to defraud is required to create liability under the statute, as the term "knowingly" includes a person who, with respect to information, "acts in deliberate ignorance" or "in reckless disregard" of the "truth or falsity of the information." § 3729(b).[2]

Despite the fact that specific intent is not a required element in most FCA cases, the current ver-

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[2] The two exceptions occur under 31 U.S.C. § 3729(a)(2) and (3), respectively. Section 3729(a)(2) creates liability for "[a]ny person" who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government," whereas § 3729(a)(3) creates liability for "[a]ny person" who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." Specific intent is a required element under each of these provisions. *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2130-31 (2008).

sion of the statute "imposes damages that are essentially punitive in nature." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). A defendant found liable under the FCA is subject to mandatory treble damages, civil penalties as great as $11,000 per claim, attorneys' fees and costs. 31 U.S.C. §§ 3729(a), 3730(d)(1).[3]

A relator who brings an action under the FCA is entitled to share in any recovery with the Federal Government. If the Federal Government does not intervene to take over prosecution of the case, the relator receives a bounty of between 25 and 30 percent of the recovery. § 3730(d)(2). If the Federal Government intervenes, the relator's bounty is reduced to between 15 and 25 percent. § 3730(d)(1).

Because of the statute's punitive nature and relaxed intent standard, *amici*'s interest in the proper application of the FCA is especially heightened in cases brought by bounty-seeking *qui tam* relators, who are not subject to Executive Branch oversight and who are "motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*,

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[3] On its face, the FCA provides for a minimum penalty of $5,000 and a maximum penalty of $10,000 per claim. 31 U.S.C. § 3729(a). In 1999, these amounts were adjusted upward to a minimum penalty of $5,500 and a maximum penalty of $11,000 per claim, pursuant to a statutory mandate applicable to civil penalties enforced by all federal agencies. *See* Civil Monetary Penalties Inflation Adjustment, 64 Fed. Reg. 47,099, 47,104 (Aug. 30, 1999) (codified at 28 C.F.R. § 85.3(a)(9)) (implementing the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890).

520 U.S. 939, 949 (1997); *see also Stevens*, 529 U.S. at 778 n.8 (reserving judgment on whether FCA's *qui tam* provisions "violate Article II [of the United States Constitution], in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3").

The number of *qui tam* suits under the FCA has grown dramatically over the past two decades. *See* U.S. Dep't of Justice, *Fraud Statistics—Overview* (2008) (charting 1048 percent increase in number of new *qui tam* cases filed in federal fiscal years 1987 and 2007, respectively), *as reprinted in* 2 John T. Boese, *Civil False Claims & Qui Tam Actions* app. H-2 (3d ed. 2008) (*Civil False Claims*). The United States pursues only a quarter of those lawsuits. *See* U.S. Dep't of Justice, *Fraud Statistics—Qui Tam Intervention Decisions & Case Status* (2008), *as reprinted in* 2 *Civil False Claims* app. H-7. The remainder are prosecuted by relators alone, who are motivated in large part by the statute's contingent bounty provision and who are not constrained by concerns as to what impact their suits will have. *See, e.g.*, *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, ___ F.3d ___, No. 07-3033, 2008 WL 4430668, at *8 (10th Cir. Oct. 2, 2008) (observing that relator's suit, which alleged that a single false certification on an annual cost report rendered legally false all of a hospital's Medicare reimbursement claims, would have "catastrophic" consequences for those that "provide medical services to the financially disadvantaged and the elderly").

The proliferation of parasitic, vexatious or otherwise unmeritorious *qui tam* suits threatens the legitimate business activities of every federal government contractor and federal grant recipient in the

United States. In 1986, Congress acted to preclude *qui tam* litigation predicated on publicly disclosed information. The "public disclosure bar," as it is commonly known, states:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [sic] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157 (codified at 31 U.S.C. § 3730(e)(4)).

The question of how to apply this "murky statute" (Pet. App. at 32a) has plagued courts and litigants ever since. *See, e.g.*, *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1407 (2007) (resolving circuit split on meaning of original-source requirement after observing that statutory question was "hardly free from doubt"); *United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 387 (3d Cir. 1999) (Alito, J.) (cataloging public disclosure

bar's numerous textual shortcomings and reaching the "inescapable conclusion" that the statute "does not reflect careful drafting" or "precise use of language").

The question presented by the petition for a writ of certiorari—whether a report, audit or investigation performed by a state or local government constitutes an "administrative ... report, ... audit, or investigation" within the meaning of the public disclosure bar—is of tremendous importance to *amici*'s members, many of which are subject to regular and numerous inspections and audits by a wide variety of state and local government agencies. These audits and inspections generally assess an entity's compliance with certain complicated (and often confusing) statutory and regulatory requirements that may affect participation in government programs receiving federal funds. The results of these inspections and audits are commonly made available to the public.

Relators, in turn, are increasingly using allegations of noncompliance with federal conditions of participation as the basis for FCA liability. *See, e.g.*, *Conner*, 2008 WL 4430668, at *2 n.5 (describing relator's allegations based on hospital's alleged noncompliance with Medicare conditions of participation); *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1169 (9th Cir. 2006) (allowing relator's suit based on university's alleged noncompliance with federal conditions of participation governing student-loan program even though federal agency in question treated noncompliance as an administrative enforcement matter, not fraud), *cert. denied*, 127 S. Ct. 2099 (2007); *United States ex rel.*

Swan v. Covenant Care, Inc., 279 F. Supp. 2d 1212, 1220 (E.D. Cal. 2002) (describing relator's allegations based on nursing facility's alleged noncompliance with Medicare conditions of participation); *United States ex rel. Sweeney v. ManorCare Health Servs., Inc.*, No. C03-5320RJB, 2005 WL 4030950, at *5 (W.D. Wash. Mar. 4, 2005) (same).

The court of appeals below held that reports and audits created by state or local governments do *not* trigger the public disclosure bar. If allowed to stand, this ruling will encourage opportunistic bounty hunters to use publicly available information found in the reports of state and local governments as the basis for *qui tam* litigation despite the fact that the FCA would deny federal courts of subject-matter jurisdiction over a *qui tam* case based on the same information published in a small-town newspaper or in an obscure federal agency report. Thus, liability for hundreds of millions of dollars in mandatory treble damages and civil penalties will turn, not on whether the information on which the suit is based was publicly disclosed, but on whether the information was publicly disclosed by a federal, as opposed to a state or local, agency.

SUMMARY OF ARGUMENT

The circuits are in sharp disagreement as to whether a publicly available audit or investigation performed by a state or local government triggers the FCA's public disclosure bar. Respondent conceded this point in a recent district-court filing. *See* Joint Motion to Stay Proceedings at 2, *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, No. 2:01CV19 (W.D.N.C. filed Oct. 6, 2008) ("As set out in the petition, the circuit split has be-

come more entrenched with the decision of the Fourth Circuit in the present case."). Rather than repeat the petition's description of the deeply entrenched circuit split, *amici* wish to emphasize other reasons why the writ should issue in this case.

First, the question presented is of significant, national importance. Because federal funding flows though almost every segment of our Nation's economy, the reach of the FCA is not limited to one industry sector or one area of the United States; it affects all who receive federal funding, whether it be large, multinational corporations, small businesses or municipalities. In addition, the question of whether a relator's suit is precluded by the public disclosure bar is one of the most frequently litigated issues in FCA cases generally, resulting in substantial litigation expense and the expenditure of significant judicial resources.

Second, the issue is ripe for resolution by this Court. Over the past twenty-two years, federal courts have struggled to reach a consensus on the meaning of the public disclosure bar as it relates to audits and investigations performed by state and local governments. That effort has produced a long series of conflicting rulings. Because numerous courts of appeals have considered the question presented without reaching a common understanding, further percolation in the lower courts is unnecessary. Moreover, this case provides an excellent vehicle in which to decide the question presented, which is squarely raised and requires no additional factual development.

Third, the Fourth Circuit incorrectly decided the question presented. Protesting that it did not have a

"secret decoder ring" by which to "gain insight into the meaning of this murky statute" (Pet. App. at 32a), the court of appeals below conceded that the public disclosure bar did not expressly limit its reach to *federal* administrative reports, audits or investigations. The Fourth Circuit then misapplied the interpretive tool of *noscitur a sociis*—that a word is known by the company it keeps—by disregarding the fact that the "company" the relevant statutory language "keeps" is not singularly federal in character. Rather, the statutory language at issue includes public disclosures made in state and federal fora, as well as in the news media.

By interpreting the statute narrowly such that only those disclosures made in federal administrative reports, audits or investigations trigger the public disclosure bar, the court of appeals below gave an impermissibly narrow construction to the statute. The Fourth Circuit's decision will not only force government contractors and grant recipients to incur substantial litigation costs, it will encourage *qui tam* relators to institute litigation based on information they had no role in uncovering and, if successful, will reward them handsomely for doing so by paying them a statutory share of hundreds of millions of dollars in mandatory treble damages and civil penalties.

Accordingly, the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

ARGUMENT

I. THE PETITION RAISES A PURE QUESTION OF FEDERAL LAW THAT IS OF SIGNIFICANT, NATIONAL IMPORTANCE

Because federal funding pervades almost every segment of the Nation's economy—from health care, education, transportation, defense, housing, technology and beyond—the potential defendants who can be sued under the FCA run the gamut from large, multinational corporations to small businesses and municipalities. The FCA, however, has become a vehicle by which bounty-seeking *qui tam* relators file suits predicated on honest mistakes and alleged violations of often-ambiguous statutes, regulations and informal agency guidance. At the same time, regular inspection and audit by state and local governments, and the concomitant publication of the results of such investigations, have become the norm in modern America. The combination of widely available compliance audits and the possibility for lottery-sized "paydays" creates the perfect environment for opportunistic litigation under the FCA as interpreted by the court of appeals below.

Perhaps reflecting the sizeable rewards potentially available in such opportunistic litigation, the question of whether a relator's suit is precluded by the FCA's public disclosure bar is one of the most often litigated issues in FCA cases, devouring countless attorney hours and significant judicial resources. *See* 1 *Civil False Claims* § 4.02[A] at 4-47 (observing that, "despite Congress's attempts to simplify jurisdiction over *qui tam* suits," the public disclosure bar "has become the most frequently litigated issue in

such actions"); Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 11.36 at 632 (2004) (observing that the public disclosure bar has "generated much of the litigation over the [FCA]").

Therefore, the question of whether an audit or investigation performed by a state or local government deprives a court of subject-matter jurisdiction over a *qui tam* relator's suit is one of wide-ranging importance deserving of plenary review.

II. FURTHER PERCOLATION IS UNNECESSARY AND THIS CASE PROVIDES AN EXCELLENT VEHICLE

A. For more than two decades, lower federal courts and litigants have wrestled with application of the FCA's public disclosure bar as it relates to reports resulting from inspections and audits performed by state and local governments. The Fourth Circuit's decision below is the latest in a long series of conflicting and frustrating appellate rulings that began over eleven years ago with the Third Circuit's decision in *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d Cir. 1997).

The courts of appeals today are no closer in reaching a consensus as to the meaning of the public disclosure bar vis-à-vis non-federal audits and reports. At last count, clearly conflicting positions have been taken by the Third, Fourth, Eighth, Ninth and Eleventh Circuits. *Compare United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 919 (9th Cir. 2006) (holding non-federal reports and audits can trigger the public disclosure bar), *cert. denied*, 128 S. Ct. 1119 (2008) (No. 06-1269); *Battle v. Board of Regents*, 468 F.3d 755, 762 (11th Cir. 2006) (same); *Hays v.*

Hoffman, 325 F.3d 982, 989 (8th Cir.) (same), *cert. denied*, 540 U.S. 877 (2003) (No. 03-92), *with United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292, 306-07 (4th Cir. 2008) (Pet. App. at 37a) (holding non-federal reports and audits cannot trigger the public disclosure bar); *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 746 (3d Cir. 1997) (same).

This case provides the Court with the opportunity to define the application of the public disclosure bar with the benefit of considerable analysis from the courts below. In addition, continued uncertainty as to how the FCA's public disclosure bar should be applied imposes substantial burdens on courts, litigants and federal funding recipients. *See, e.g.*, Pet. App. at 28a, 32a (acknowledging the "logic and symmetry" of sister circuits' contrary rulings and lamenting the fact that Congress did not provide a "secret decoder ring" by which to interpret the public disclosure bar).

The case of *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, No. 06 Civ. 2860 (S.D.N.Y.), provides a representative example of the consequences of leaving the question unresolved. In *Anti-Discrimination Center*, the district court held in a published opinion that the public disclosure bar does not include a report, audit or investigation performed by a county government. *See United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County*, 495 F. Supp. 2d 375, 383 (S.D.N.Y. 2007). As a result, a *qui tam* action seeking over $100 million in treble damages and statutory penalties was allowed to proceed based on the relator's

allegation that the county-defendant falsely promised that it would "affirmatively further fair housing" in return for federal funding. *Id.* at 377 (quoting 24 C.F.R. § 91.425(a)(1)(i)).

Citing the entrenched circuit split that existed even before the Fourth Circuit's decision below, the county-defendant asked the district court to issue an order under 28 U.S.C. § 1292(b) allowing the county to pursue an interlocutory appeal to the Second Circuit. Although the Second Circuit is one of the few remaining circuits not to have decided the question, the district court refused the county's request in a brief, unpublished opinion. *See United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County*, No. 06 Civ. 2860, 2007 WL 2402997 (S.D.N.Y. Aug. 22, 2007).

Review of the case's electronic docket indicates that, following the district court's decision, the parties have engaged in substantial motions practice and extensive discovery. Among other things, seven expert witnesses have been deposed and the parties have only recently filed cross-motions for summary judgment. Unquestionably this process has resulted in significant expense to the parties and the expenditure of substantial judicial resources.

The need to invest judicial and other resources should be dictated by the requirements of the FCA, not by whether a defendant is sued in North Carolina as opposed to California. This Court should remove the climate of uncertainty that currently requires courts and litigants to invest such extensive resources that could have been—and ultimately perhaps should have been—devoted to other matters.

B. This case provides an excellent vehicle by which to decide the question presented. The pure question of federal law raised by the petition is cleanly presented, requires no factual development, and is unencumbered by subsidiary issues. Moreover, the parties in this case are represented by able counsel who have previously appeared before this Court to argue an important statutory question arising under the FCA. *See Graham County Soil & Water Conservation Dist. v. Wilson*, 545 U.S. 409 (2005) (deciding limitations period applicable to FCA retaliation claims), *rev'g* 367 F.3d 245 (4th Cir. 2004). Therefore, the Court can issue the writ "satisfied that the relevant issues [will be] fully aired." *Clay v. United States*, 537 U.S. 522, 526 n.2 (2003).

Moreover, unlike *Bly-Magee*, this case does not involve an FCA suit of dubious merit whose dismissal upon remand is a foregone conclusion. *See* Brief for the United States as *Amicus Curiae* at 18-19, *United States ex rel. Bly-Magee v. Premo*, No. 06-1269 (U.S. filed Dec. 21, 2007) (conceding existence of circuit split but counseling against plenary review due to "substantial likelihood" relator's case would be dismissed upon remand for failure to plead fraud with particularity). Also in contrast to *Bly-Magee*, this case presents the broader question of whether a report or audit performed by a state *or* local government triggers the public disclosure bar. *See* Pet. App. at 6a; Brief for the Respondents in Opposition at i n.1, *United States ex rel. Bly-Magee v. Premo*, No. 06-1269 (U.S. filed Apr. 17, 2007) (objecting to petitioner's framing of the question presented and observing that case only raised question of whether state disclosures triggered the public disclosure bar).

III. THE DECISION BELOW IS INCORRECT

Federal courts have a "duty to construe statutes, not isolated provisions." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995). An Act of Congress "should not be read as a series of unrelated and isolated provisions." *Id.* at 570. The court of appeals below lost sight of these fundamental principles in holding that the FCA's public disclosure bar does not encompass public disclosures resulting from state or local government reports, audits or investigations.

Conceding that the statute did not expressly limit its reach to *federal* administrative reports, audits or investigations, the Fourth Circuit concluded that the word "administrative" was ambiguous. The court of appeals then looked to the doctrine of *noscitur a sociis* as a substitute for the "secret decoder ring" the court said Congress failed to provide in order to "gain insight into the meaning of this murky statute." Pet. App. at 32a. The court of appeals then misapplied the doctrine by focusing myopically on only one part of the statutory language in question.

A. "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). The maxim can be a "useful rule of construction where words are of obscure or doubtful meaning; and then, but only then, its aid may be sought to remove the obscurity or doubt by reference to the associated words." *Russell Motor Car Co. v. United States*, 261 U.S. 514, 520 (1923).

In *Russell Motor Car*, for example, this Court was asked to decide whether a statute authorizing the President to "modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or materials" for a limited time following the end of World War I applied only to contracts between private parties, as the petitioners argued, or whether government contracts could also be modified by the President. *See id.* at 519. It was "apparent," the Court found, that the words of the statute, "read with literal exactness, include[d] all contracts, whether private or governmental." *Id.* In response, the petitioners argued that since the Federal Government could not "requisition" its own contracts—an assertion accepted by the Court—the doctrine of *noscitur a sociis* counseled that the general words "modify, suspend, [or] cancel" should be similarly limited so that only private contracts could be modified, suspended or canceled by the President. *See id.*

In rejecting the petitioners' argument, the Court observed that *noscitur a sociis* is "not an invariable rule, for the word may have a character of its own not to be submerged by its association. Rules of statutory construction are to be invoked as aids to ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place, as this Court has many times held, except in the domain of ambiguity." *Id.* at 519.

The Court found that application of the doctrine produced an illogical result in the case before it, noting that "there is nothing in the rule or in the statute which requires us to assimilate the words 'modify' and 'cancel' to the scope of the word 'requisi-

tion,' simply because the latter has a necessarily narrower application." *Id.* at 520. The Court further explained:

> The meaning of the several words, standing apart, being perfectly plain, what should be done is to apply them distributively, *diverso intuitu* [with a different view, purpose or design], giving each its natural value and appropriate scope when read in connection with the object (any contract) which they are severally meant to control. Thus, the predicate 'requisition' will be limited to private contracts, while the other words may be appropriately extended to include governmental contracts as well.

Id. at 519-20.

B. *Russell Motor Car* is instructive for how the Court should approach the question presented by this case. It cannot be gainsaid that, "read with literal exactness," *Russell Motor Car*, 261 U.S. at 519, a report, hearing, audit or investigation performed by a state or local government falls within the plain language of the FCA's public disclosure bar. Again, the public disclosure bar provides, in relevant part:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media . . . .

31 U.S.C. § 3730(e)(4)(A). Simply because the words "congressional" and "Government Accounting Office"

connote federal activity does not mean that the word "administrative" must be so limited or that the word "administrative" is ambiguous. Instead, the "meaning of the several words, standing apart, being perfectly plain, what should be done is to apply them distributively, . . . giving each its natural value and appropriate scope when read in connection with the object . . . which they are severally meant to control." *Russell Motor Car*, 261 U.S. at 520.

The "object" which the public disclosure bar is "meant to control" is the prevention of parasitic lawsuits. *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992) ("The 1986 amendments [to the FCA] attempt to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud."); *see also United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546 (1943) (allowing relator's case to proceed even though it was based on criminal indictment filed by federal authorities). Excluding public disclosures simply because they emanate from state- or local-government sources conflicts with the core purpose of the statute by encouraging *qui tam* suits based on public information.

As reflected by the Fourth Circuit's decision, the answer to the question presented is dictated in large part by how wide of a lens one uses when applying the doctrine of *noscitur a sociis*. The court of appeals focused its attention only on the words immediately before and after the word "administrative"—"congressional" and "Government Accounting Office," respectively—in order to extract a common charac-

teristic of the "company" kept by the word "administrative." The Fourth Circuit erred in doing so, however. As one federal court has aptly observed:

> [L]imiting the word "administrative" to only federal administrative reports, audits and investigations is inconsistent with the plain language of the phrase at issue as well as the language and interpretation of the remaining portions of § 3730(e)(4)(A). The immediately preceding phrase in that statutory section provides that public disclosures include any "criminal, civil, or administrative hearing," and courts have consistently interpreted that phrase to include both *state* and *federal* litigation and administrative hearings. . . . Likewise, this section of the FCA also gives public disclosure status to "the news media" regardless of whether that media is national, state, or local. There is no reason to conclude that Congress intended to limit administrative reports, audits, and investigations to *federal* actions, while simultaneously allowing all *state* and *local* civil litigation, *state* and *local* administrative hearings, and *state* and *local* news media to be treated as public disclosures. To interpret the statute so narrowly would have the anomalous result of allowing public disclosure status to the most obscure local news report and the most obscure state and local civil lawsuit or administrative hearing, but denying public disclosure status to a formal public report of a state government agency . . . .

In re Natural Gas Royalties Qui Tam Litig., 467 F. Supp. 2d 1117, 1143-44 (D. Wyo. 2006) (citations and

footnote omitted), *appeal pending*, No. 06-8099 (10th Cir. argued Sept. 25, 2008).

In other words, the "company" the relevant statutory language "keeps" is not singularly federal in character. Rather, the statutory language at issue includes public disclosures made in state and federal fora, as well as in the news media. By interpreting the statute narrowly such that only those disclosures made in federal administrative reports, audits or investigations trigger the public disclosure bar, the court of appeals below gave an impermissibly narrow construction to the statute.

Nor was it necessary to interpret the statutory language as the Fourth Circuit did in order to "avoid the giving of unintended breadth to [an Act] of Congress." *G. D. Searle*, 367 U.S. at 307. As the court of appeals itself acknowledged, the words that precede "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation" have been uniformly held to include disclosures made in non-federal settings. *See* Pet. App. at 26a ("This court and others have understood [the words 'criminal, civil, or administrative hearing'] to encompass state as well as federal hearings."). Therefore, interpreting the words "administrative . . . report, . . . audit, or investigation" in a similar fashion does not expand the statute's meaning past the non-federal boundaries already established by Congress in other portions of the public disclosure bar. *Cf.* 132 Cong. Rec. S11,238-04 (daily ed. Aug. 11, 1986) (remarks of Sen. Grassley) ("The use of the term 'Government' in the definition of original source is meant to include any Government source of disclosures cited in subsection [(4)(A)]; that is, Government includes Con-

gress, the General Accounting Office, any executive or independent agency *as well as all other governmental bodies that may have publicly disclosed the allegations.*") (emphasis added).

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

GRAHAM COUNTY SOIL AND WATER CONSERVATION DISTRICT, ET AL.,

Petitioners,

v.

UNITED STATES, EX REL. KAREN T. WILSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF NATIONAL LEAGUE OF CITIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether an audit and investigation performed by a State or its political subdivision constitutes an "administrative * * * report, * * * audit, or investigation" within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

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INTEREST OF *AMICUS CURIAE*

The National League of Cities (NLC) was established in 1924 by and for reform-minded state municipal leagues.* Today it represents more than 19,000 cities, villages, and towns across the country. NLC's mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, to provide programs and services that enable local leaders to better serve their communities, and to function as a national resource and advocate for the municipal governments it represents.

In *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119 (2003), this Court held that private plaintiffs may sue local governments under the False Claims Act. This case presents the question whether a private plaintiff's suit under the Act is barred when it is based upon allegations that have already been publicly disclosed in an audit report of a state or local government. The resolution of that question affects the exposure of local governments to liability under the False Claims Act, the consequences to local governments of conducting a self-audit, and, more generally, the conditions under which local government administer federally funded programs. For that reason, NLC has an obvious and substantial interest in the question presented and a unique per-

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* Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2(a), counsel of record for both parties received timely notice of the intent to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

spective on its proper resolution. NLC regularly files *amicus* briefs in cases that, like this one, raise issues of vital concern to the Nation's cities.

REASONS FOR GRANTING THE PETITION

The False Claims Act authorizes suits by "relators," private citizens acting on behalf of the United States, against those who submit fraudulent claims to the federal government. 31 U.S.C. §§ 3729(a), 3730(b). The Act provides that courts lack jurisdiction over such actions, known as "*qui tam*" suits, if they are

> based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by * * * an original source of the information.

31 U.S.C. § 3730(e)(4)(A). The question presented in this case is whether the second clause of the jurisdictional bar—"congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation"—applies to *qui tam* suits that are based upon public disclosures in an audit report prepared by a state or local administrative agency.

The very same question was before the Court last Term in *United States ex rel. Bly-Magee* v. *Premo*, No. 06-1269. The Court determined that that case was a strong enough candidate for certiorari to warrant a request for the views of the Solicitor General. *United States ex rel. Bly-Magee* v. *Premo*, 127 S. Ct. 2905 (2007). In his brief, the Solicitor General acknowledged that there was what was then a three-to-

one circuit conflict on the question, but recommended that the Court deny certiorari, in part because further developments in the lower courts might obviate the need for this Court's intervention. Br. for U.S. as Amicus Curiae at 7, 16, 18, 20, No. 06-1269 (Dec. 21, 2007). The Court ultimately denied certiorari. *United States ex rel. Bly-Magee* v. *Premo*, 128 S. Ct. 1119 (2008).

There have now been further developments in the lower courts. The Fourth Circuit has joined the Third Circuit, which was previously the only circuit in the minority, in holding that "administrative" in clause two of the False Claims Act's jurisdictional bar has an exclusively federal meaning. As a consequence of the Fourth Circuit's decision in this case, there is no reason for the Court to await still further developments in the lower courts. There is now a three-to-two circuit conflict, which will persist, and almost certainly expand, unless the Court grants review.

The petition spells out why the Court should do so. In addition to describing the entrenched circuit conflict (Pet. 8-16), it explains why the question presented is one of recurring importance (Pet. 16-19) and why the Fourth Circuit's interpretation of the False Claims Act is incorrect (Pet. 22-26). In this brief, we explain why the question presented is one of recurring importance from the specific perspective of NLC and the local governments it represents (see Point A, *infra*) and we elaborate on the reasons why the court of appeals' interpretation of the False Claims Act is incorrect (see Point B, *infra*).

A. The Decision Below Harms Local Governments.

For most of the long history of the False Claims Act, *qui tam* actions were not brought against States or local governments. In 2000, this Court confirmed that *qui tam* actions could not be brought against States. *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000). Three years later, however, the Court held that local governments, unlike States, are subject to *qui tam* suits. *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119 (2003). That decision has exposed more than 87,000 local governments to suits under the False Claims Act. See U.S. Bureau of Census, Federal, State and Local Governments, 2002 Census of Governments, *Preliminary Report No. 1*, July 2002, at 1, available at http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf. At the same time, there has been a marked increase in the number of False Claims Act filings by private plaintiffs. In the four years after the decision in *Cook County*, for example, over 1,500 *qui tam* suits were filed, with resulting awards of more than $680 million to relators. See U.S. Department of Justice, Civil Division, *Fraud Statistics Overview*, at 2, available at http://www.taf.org/STATS-FY-2007.pdf.

Many of the *qui tam* suits since *Cook County* have been filed against local governments, which participate in a variety of federal programs and receive substantial federal funding. See *Cook County*, 538 U.S. at 129. In 2001-2002, the most recent period for which statistics are available, federal payments accounted for $15.2 billion of municipal governments' revenues. See 2002 Census of Governments, *Finances of Municipal and Township Gov-*

ernments: 2002, Apr. 2005, at 1, available at http://www.census.gov/prod/2005pubs/gc024x4.pdf. Federal payments have likely grown in more recent years, given the dramatic rise in the number of federally funded programs since September 11, 2001. See, *e.g.*, Steven Maguire & Shawn Reese, *CRS Report for Congress, Department of Homeland Security Grants to State and Local Governments: FY2003 to FY2006*, Dec. 22, 2006, available at http://www.fas.org/sgp/crs/homesec/RL33770.pdf (discussing various grant programs instituted after September 11, 2001, including the Law Enforcement Terrorism Prevention Program and the Metropolitan Medical Response Program). Counties and municipalities participating in federally funded programs regularly conduct audits or investigations in connection with the programs—often as a condition of their participation, occasionally at the request of the relevant federal agency, and sometimes simply as a matter of good governance.

As we explain below, the court of appeals' decision harms local governments, and the citizens they serve, in two important ways. First, by adopting an unduly narrow interpretation of the jurisdictional bar, the court has made it easier for relators to bring *qui tam* suits against local governments, which will be required, as a consequence, to divert scarce resources to litigate suits by opportunistic plaintiffs that could not be brought under the correct interpretation of the statute. Second, by enabling relators to sue local governments on the basis of information obtained from the governments' own audits and investigations, the court of appeals has created a disincentive for local governments to conduct socially beneficial audits and investigations and to make their findings public.

1. The court of appeals' decision will require local governments to divert scarce resources to litigate opportunistic *qui tam* suits.

Under the correct interpretation of the False Claims Act, a *qui tam* suit is jurisdictionally barred if it is based upon the public disclosure of information in an audit or investigation conducted by a state or local administrative agency. See Pet. 22-26. Under the incorrect interpretation adopted by the court below, a *qui tam* suit is not barred in that circumstance. Unless this Court intervenes, therefore, counties and municipalities in many States, including New Jersey, Pennsylvania, Maryland, Virginia, and North Carolina, will have to pay the costs of litigation, and frequently of settlements and judgments, including treble damages and attorneys' fees, see 31 U.S.C. §§ 3729(a)(7), 3730(g), in cases that should have been dismissed for lack of jurisdiction under the correct interpretation of the statute. That money will necessarily come from the budgets of the counties and municipalities, many of which are already experiencing severe difficulties in funding essential services for their citizens.

A substantial proportion of local governments' budgets is devoted to law enforcement, emergency services, and other first responders. See U.S. Department of Labor, Bureau of Labor Statistics, *Career Guide to Industries, 2008-09 Edition, State and Local Government Excluding Education and Hospitals*, Mar. 12, 2008, available at http://www.bls.gov/oco/cg/cgs042.htm ("Local governments employ more than twice as many workers as State governments. Professional and service occupations accounted for more than half of all jobs; fire fighters and law en-

forcement workers, concentrated in local government, are the largest occupations."). In 2001-2002, for example, public safety accounted for over 15 percent of local governments' expenditures. See 2002 Census of Governments, *supra*, at 1. Over the past year, cities' budgets have become increasingly stretched. As a result of declining economic conditions driven by downturns in housing, consumer spending, jobs, and income, two thirds of city financial officers have reported that their cities are less able to meet fiscal needs in 2008 than in the previous year. See National League of Cities, *City Fiscal Conditions in 2008*, Sept. 2008, at 1, available at http://66.218.181.91/ASSETS/A49C86122F0D4DBD812B91DD5777F04D/CityFiscal_Brief_08-FINAL.pdf. In light of the current financial crisis, that trend is almost certain to continue. The costs associated with *qui tam* actions that are permitted under the minority rule will therefore impose significant hardships on local governments already struggling to provide adequate public safety and other essential services, including health care and education.

It is particularly unfair to require local governments to divert scarce resources to litigate the type of *qui tam* actions that are at issue in this case. As noted in the petition (at 17), one consequence of the court of appeals' decision is that individuals without independent knowledge of a false claim can simply monitor local government reports, audits, and investigations (or obtain them through freedom-of-information requests) and file opportunistic *qui tam* suits based on any improprieties that are publicly disclosed. The court's erroneous rule, therefore, not only will require local governments to spend money on *qui tam* litigation that could otherwise be spent on essential services, it will require them to use

those funds to pay a windfall to opportunistic plaintiffs who played no role in bringing the alleged wrongdoing to light.

2. The court of appeals' decision will discourage local governments from conducting self-audits and disclosing the results.

Under the court of appeals' interpretation of the jurisdictional bar, the results of audits and investigations can be used as the basis for *qui tam* suits against the counties and municipalities that conducted them. As the petition notes (at 17-18), local governments may understandably seek to avoid such suits by deciding not to conduct a particular audit or investigation or, if they do conduct one, by deciding not to make the results of the audit or investigation public. In either event, the citizens of the county or city will suffer.

The type of publicly disclosed self-policing at issue here serves a number of important purposes. It reveals improprieties in the administration of federal programs; it informs local voters how elected officials are performing their duties; and it provides a general deterrent to local employees. If publicly disclosed self-policing can expose local governments to *qui tam* actions by opportunistic relators, with the attendant possibility of treble damages and attorneys' fees, there is likely to be a reduction in either self-policing or public disclosure, in which case many of these benefits will be lost. The court of appeals in effect applied the principle that no good deed should go unpunished; under its interpretation of the jurisdictional bar, the "reward" for publicly disclosed self-policing is a lawsuit. Because a predictable consequence of the court's decision is that counties and

municipalities will, when possible, either decline to investigate themselves or decline to disclose their findings, the decision, in addition to being incorrect as a matter of law, is both unfair and unwise. Local governments should not be put to the Hobson's choice of subjecting themselves to litigation or avoiding self-investigation.

B. The Decision Below Misinterprets The False Claims Act.

The court of appeals began its analysis by acknowledging that the False Claims Act's jurisdictional bar "by its express terms does not limit its reach to federal administrative reports or investigations" and that "there is nothing inherently federal about the word 'administrative.'" Pet. App. 22a-23a. One might have thought that that would be not only the beginning of the analysis but the end, inasmuch as the "cardinal canon" of statutory interpretation is that "a legislature says in a statute what it means and means in a statute what it says," *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992), and inasmuch as "statutory terms are generally interpreted in accordance with their ordinary meaning," *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 91 (2006). Rather than relying on the ordinary meaning of "administrative," however, the court relied on a much more obscure interpretive canon—*noscitur a sociis*—and what it perceived to be the purpose of the jurisdictional bar. As we explain below, neither provides a basis for the court's holding that "administrative" in the jurisdictional bar's second clause has an exclusively federal meaning.

1. The canon *noscitur a sociis* does not support the court of appeals' interpretation of the jurisdictional bar.

While acknowledging that "it may not be the strongest of interpretive principles" (Pet. App. 32a), the court of appeals rested its decision primarily on the canon *noscitur a sociis*. *Id.* at 22a-26a, 30a-33a. That canon "reminds us that 'a word is known by the company it keeps,' and is invoked when a string of statutory terms raises the implication that the 'words grouped in a list should be given related meaning.'" *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006) (quoting *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995), and *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 36 (1990)). Applying the canon here, the court concluded that the reference to two federal sources in the second clause of the jurisdictional bar—"congressional" and "Government Accounting Office"—required the remaining source in that clause—"administrative"—to be likewise limited. The court's application of *noscitur a sociis* is flawed in multiple respects.

First, the canon may be applied only when "the legislative intent or meaning of a statute is not clear" and the meaning of particular words is "doubtful." 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland on Statutory Construction* § 47.16 at 347 (7th ed. 2007). *Noscitur a sociis* "ha[s] no place * * * except in the domain of ambiguity." *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 519 (1923); see, *e.g.*, *S.D. Warren*, 547 U.S. at 378-380 (concluding that the "everyday sense of the term" governed and that resort to *noscitur a sociis* was inappropriate).

As the petition explains (at 23), and as the court of appeals essentially acknowledged (Pet. App. 22a-

23a), there is nothing doubtful or ambiguous about the term "administrative" in the second clause of the jurisdictional bar. The term has no distinctive federal connotation and plainly covers state and local proceedings and the work product of state and local agencies. The very premise for invoking *noscitur a sociis* is therefore absent. Instead of using the common attribute of the terms in a list to illuminate the meaning of an otherwise unclear provision—the proper application of the canon—the court of appeals found a common attribute and then grafted it onto an otherwise clear provision. The court in effect applied the canon backwards.

Second, even if the term "administrative" in the jurisdictional bar's second clause is thought to be ambiguous, the *noscitur a sociis* canon still does not apply. Just last Term, this Court emphasized that canons of construction in general, and *noscitur a sociis* in particular, should not be applied "woodenly," and that they must "yield when the whole context dictates a different conclusion." *Ali* v. *Fed. Bureau of Prisons*, 128 S. Ct. 831, 840-841 (2008) (quoting *Norfolk & W. Ry.* v. *Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991)). Consistent with that principle, courts have declined to apply *noscitur a sociis* when "the meaning of a word is unclear in one part of a statute but clear in another part." 2A Singer & Singer, *supra*, § 47.16 at 357. In that circumstance, "the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute." *Ibid.*

The term "administrative" appears not only in the second clause of the jurisdictional bar, but also in the first, which extends the bar to actions based upon the public disclosure of information in a "crimi-

nal, civil, or administrative hearing." As the Ninth Circuit has correctly observed, "[t]he unambiguous text" of that clause "does not contain any federal limitation." *A-1 Ambulance Serv., Inc.* v. *California*, 202 F.3d 1238, 1244 (9th Cir. 2000). Indeed, the term "administrative" in the first clause of the jurisdictional bar has been uniformly interpreted to cover state and local administrative proceedings, as the court below recognized. See Pet. App. 26a (collecting cases). Accordingly, even assuming that the meaning of "administrative" in the second clause is unclear in isolation, it has an unambiguous meaning in the first clause (one that has no federal limitation), and thus *noscitur a sociis* does not apply to the second clause. Otherwise, the same terms, in the same provision, might be interpreted differently. The presumption that "a given term is used to mean the same thing throughout a statute" is "at its most vigorous" when, as here, "a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994).

Third, even if the meaning of "administrative" is thought to be unclear in both the first and the second clause of the jurisdictional bar, so that resort to *noscitur a sociis* is warranted, the court of appeals applied the canon incorrectly. If it is true, as this Court has repeatedly said, that courts should "construe statutes, not isolated provisions," *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 568 (1995), it is *a fortiori* true that courts should not construe isolated *clauses* in a statutory provision. Yet that is what the court of appeals did here.

In applying the *noscitur a sociis* canon, the court focused narrowly on the second clause of the jurisdictional bar; it relied on the fact that that the two

terms in the second clause other than "administrative"—"congressional" and "Government Accounting Office"—are inherently federal entities. The court ignored the fact that *none* of the terms in the two *other* clauses of the jurisdictional bar has a distinctly federal connotation. The first clause covers information in a "criminal, civil, or administrative hearing," and the third clause covers information from the "news media." There is nothing inherently federal about "criminal," "civil," or "administrative" hearings, which are obviously conducted by state and local courts and agencies, and there is nothing inherently federal about the "news media," which obviously have state and local outlets. The common attribute of the terms in the jurisdictional bar *in its entirety*—including the terms in the second clause ("congressional," "administrative," and "Government Accounting Office" reports, hearings, audits, and investigations)—is not that they are federal in character, but that they describe proceedings or work product that are commonly disseminated in the public domain. Accordingly, if *noscitur a sociis* is applied to the jurisdictional bar as a whole, as it should be, and the "list" of relevant items is assembled from the entire provision rather than from the second clause alone, the canon confirms that "administrative" should be given its customarily broad meaning.

2. The statutory purpose does not support the court of appeals' interpretation of the jurisdictional bar.

In holding that "administrative" in the jurisdictional bar's second clause has an exclusively federal meaning, the court of appeals also relied (Pet. App. 33a-36a) on what it believed to be the purpose of the 1986 amendments to the False Claims Act: "fur-

ther[ing] the 'twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own.'" Pet. App. 35a (quoting *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994)). The court reasoned that this statutory purpose justifies its interpretation because "[i]nformation about federal investigations and audits is easily available to the members of the Department of Justice," while "information about most state and local investigations, audits, or reports is [not] particularly likely to come to the attention of the federal government." Pet. App. 35a-36a. This reasoning is flawed in multiple respects.

As an initial matter, Congress indisputably intended to bar *qui tam* suits based on certain publicly disclosed information that is no easier for the federal government to obtain than information in state and local administrative audits and investigations. For example, a state administrative *hearing* is covered by the first clause of the jurisdictional bar, as the court of appeals acknowledged (Pet. App. 26a), and "[t]he federal government is no less likely to obtain information from a state administrative audit than it is from a state administrative hearing." *United States ex rel. Bly-Magee* v. *Premo*, 470 F.3d 914, 918 (9th Cir. 2006). Likewise, an obscure report in a local media outlet is covered by the third clause of the jurisdictional bar, and the federal government is no less likely to obtain a state or local administrative audit or investigative report than it is to obtain an obscure local news report. Indeed, given the vast scale of federal administrative activity, many of the *federal* sources covered by the second clause of the jurisdictional bar are no more likely to come to the attention of the Department of Justice than a state

or local administrative audit or investigation. The statutory purpose identified by the court of appeals thus provides no basis for excluding state and local administrative audits and investigations from the jurisdictional bar.

In any event, interpreting the jurisdictional bar to include state and local administrative audits and investigations does not defeat that purpose. The statute provides that the information at issue must be "publicly disclosed" before the bar applies, and courts have held that information is "publicly disclosed" if it is made accessible to the public through an affirmative act. See, *e.g.*, *United States ex rel. Hochman* v. *Nackman*, 145 F.3d 1069, 1072 (9th Cir. 1998); *United States ex rel. Ramseyer* v. *Century Healthcare Corp.*, 90 F.3d 1514, 1519 (10th Cir. 1996). This requirement significantly reduces the likelihood that state and local audits and investigations to which the bar applies will go unnoticed by the federal government.

Finally, promoting suits that the federal government is not in a position to bring itself is not the only purpose of the 1986 amendments to the False Claims Act. Congress also had the objective of providing "adequate incentives for whistle-blowing insiders with genuinely valuable information" and discouraging "opportunistic plaintiffs who have no significant information to contribute of their own." *Springfield Terminal Ry.*, 14 F.3d at 649. Although the court of appeals alluded to this distinct purpose in its opinion (Pet. App. 33a-34a), the court essentially ignored it in holding that "administrative" audits and investigations in clause two exclude those conducted by state and local governments. The goal of discouraging opportunistic suits is no less under-

mined by plaintiffs who obtain their information from state and local audits and investigations than by those who obtain their information from a federal source. Under the court of appeals' interpretation, a relator could literally copy information out of the relevant state or local government source and then recover a windfall. Indeed, he could do so even if the federal government were fully aware of the information. Congress could not have intended that result.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 08-304

In the Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL.,

Petitioners

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FOURTH CIRCUIT

BRIEF OF THE STATES OF PENNSYLVANIA, FLORIDA, HAWAII, INDIANA, KANSAS, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, UTAH, VERMONT, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The *amici* are states which administer programs involving federal funds, in the course of which they investigate for improper or fraudulent claims and prepare audits and reports concerning the funds. The states have an interest in having these investigations, audits, and reports, which are available to the public, considered "public disclosures" for purposes of the False Claims Act so that persons who do no more than gain access to the state's work will not be able simply on that basis to file *qui tam* actions, potentially preventing the states from benefiting by their own work by filing such claims themselves.[1]

SUMMARY OF ARGUMENT

The Court should review this case to resolve a split among the circuits as to whether state investigations, audits and reports which are available to the public fall within that category of documents, which, together with newspapers and federal reports, are considered public disclosure for purposes of the False Claims Act. This is important to the states because, if state reports are not considered public documents, *qui tam* plaintiffs could simply take advantage of state work and file suit on that basis, and if they beat the state to the courthouse, foreclose the state from gaining the benefit of its own work by virtue of the False Claims Act first to file rule.

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae* intention to file this brief.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition and reverse the judgment of the Court of Appeals, which is wrongly decided and adds to a split among the circuits on this important issue concerning the scope of the "public disclosure" jurisdictional bar of the False Claims Act.

1. The False Claims Act, 31 U.S.C. §§ 3729-2733 (FCA), provides that any "person" who submits a "false or fraudulent" claim to the United States Government for payment is liable to a civil penalty and treble damages. 31 U.S.C. §3729(a).[2] The FCA also allows for "*qui tam*" actions. That is, a private person may bring an FCA claim on behalf of the government. 31 U.S.C. §3730. The government may choose to intervene in a *qui tam* action, but whether or not it does, the private party is entitled to a share in the recovery. 31 U.S.C. §3730(d). The amendments to the law in 1986 which permitted *qui tam* actions also restrict the *qui tam* rights of persons who obtained their information from public sources and who were not themselves original sources of the information:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional,

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[2] The Court has said that local governments are "persons" for purposes of liability under the FCA. *Cook County Illinois v. United States, ex rel. Chandler*, 538 U.S. 119 (2003), but that States and their agencies are not, *Vermont Agency of Natural Resources v. United States, ex rel. Stevens*, 592 U.S. 765 (2000).

> administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.

31 U.S.C. §3730(e)(4)(A). The purpose of this amendment, many courts have recognized, is "to encourage legitimate private suits by legitimate whistleblowers while barring suits by opportunistic *qui tam* plaintiffs who base their claims on matters that have been publicly disclosed by others." *Hays v. Hoffman*, 325 F.3d 982, 987 (8th Cir.), *cert. denied*, 540 U.S. 877 (2003), citing *Minn. Ass'n of Nurse Anesthetists, United States ex rel. v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1040-43 (8th Cir.), *cert. denied*, 537 U.S. 944, 123 S.Ct. 345, 154 L.Ed.2d 252 (2002); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649-51 (D.C.Cir. 1994); *United States ex rel. Stinson Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1152-54 (3d Cir. 1991); S. Rep. No. 99-346, 99th Cong. 2nd Sess., *reprinted* in 1986 U.S.C.C.A.N. 5266.

2. As Petitioner has pointed out, some courts of appeals that have considered the issue have promoted this sensible view of the statutory amendment by reading its plain language to include state administrative investigations, audits and reports among the categories of public disclosures which raise the FCA's jurisdictional bar to preclude *qui tam* suits by any besides original sources. *See United States ex rel. Bly Magee v. Premo*, 470 F.3d 914, 917-18 (9th Cir. 2006), *cert. denied*, 128 S.Ct. 1119 (2008); *Battle v. Bd. of Regents*, 468 F.3d 755, 762 (11th Cir. 2006); *Hays v. Hoffman*, 325 F.3d 988 (8th Cir.), *cert. denied*, 540 U.S.

877 (2003); *United States ex rel. Fried v. W. Indep. Sch. Dist.*, 527 F.3d 439 (5th Cir. 2008).

On the other hand, the decision of the Court of Appeals in this case, relying in large part on the reasoning of *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d Cir. 1997), has held that "the placement of 'administrative' squarely in the list of obviously federal sources strongly suggests that 'administrative' should likewise be restricted to *federal* administrative reports, hearings, audits, or investigations." Pet. App. 23a-24a. The Court of Appeals reached this result even though it acknowledged that its reading of the statute would mean that newspapers and state administrative hearings would qualify as "public disclosure" but that state audits, investigations, and reports (which could be public or subject to public disclosure) would not, and that the argument that this was an anomalous result had "some force." Pet. App. 28a. The court thought that its approach was nevertheless necessary to give effect to "every word in [the] statute." Pet. App. 31a.

3. It is important that the Court review the decision of the court of appeals because its reading of the FCA will have a direct impact on states which administer programs involving federal funds. In the first place it seems anomalous that federal audits and reports qualify as "public disclosure" while state audits and reports, available to the public and often performed as a requirement of the receipt or administration of federal funds, do not. Especially odd is that the court of appeals' reading of the FCA does not even accord these state documents, which are public, even the status of a newspaper, which

explicitly qualifies under the FCA as public disclosure.

States are potential *qui tam* plaintiffs themselves, but may be barred from filing an action if they are beaten to the courthouse by another plaintiff who has gotten this information from a state report or audit concerning federally funded programs. These programs are too numerous to detail, but Medicaid, a health insurance program for the poor, jointly funded by the state and federal governments, 42 U.S.C. §1396, *et seq.*, is a good example of the type of program administered by states which involve federal funds and state audits. *See Hays v. Hoffman*, 325 F.3d 982 (8th Cir.), *cert. denied*, 540 U.S. 877 (2003). In the case of Medicaid, the court in *Hays* noted, state audits are required by federal regulations to audit records and investigate fraud and report the findings of their investigations to the federal Department of Health and Human Services. 325 F.3d at 989.[3]

The Medicaid program has also accounted for large numbers of FCA recoveries. In 2006, for example, the Department of Justice reported FCA recoveries of $3.1 billion in settlements and judgments (bringing the total from 1986 to $16 billion), of which $1.3 billion of

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[3] Besides the specific requirements regarding Medicaid, States that expand in a fiscal year total federal grants in excess of $300,000 must prepare audit reports, 31 U.S.C. §7502(a)(1)(A), an independent auditor must conduct the audit in accordance with generally accepted government auditing standards. 31 U.S.C. §7502(c). State Agencies which act as a "pass-through" entity for federal funds are subject to additional investigative and monitoring responsibilities, 31 U.S.C. §7502(f)(2)(B)-(D), which also contemplate the use of an independent auditor.

the total for the year were attributable to *qui tam* actions. *Department of Justice Release #06-783*, http://www.usdoj.gov/opa/pr/2006/November/06_civ_783.html; That year, 72% of the recoveries were based on healthcare, with Medicare and Medicaid "bear[ing] the brunt of healthcare fraud." *Id.* In 2005, Medicare and Medicaid were responsible for the "lion's share" of the $1.4 billion in settlements and judgments under the False Claims Act, of which $1.1 were attributable to *qui tam* actions; Department of Justice Release #05-595, *http://www.usdoj.gov/opa/pr/2005/November/05_civ_595.html*;and for 2003, the Justice reported that, "as in the last several years, healthcare fraud accounted for the lion's share" of that year's $2.1 billion in FCA recoveries, of which $1.48 billion was attributable to *qui tam* actions. *Department of Justice Release #03-613*, http://www.usdoj.gov/opa/pr/2003/November/03_civ_613.html.

States are potential *qui tam* plaintiffs in programs, like Medicaid, that they administer, and their investigation, audits, and reports may well uncover instances of fraud or abuse. The decision of the court of appeals, however, affects their rights to do so, because it enables persons who do no more than obtain these public documents to file a *qui tam* action themselves on this basis and, if they are first to file to defeat a state's claim. The first filer of a *qui tam* action forecloses all subsequent *qui tam* claims. 31 U.S.C. §3730(b)(5). The operation of this rule and the court of appeals' reading of the FCA means that a state may be prevented from getting the benefit of its own work, by a party whose only involvement is reading and taking advantage of that work.

This is not a far-fetched scenario. A perusal of "*qui tam*" on the internet reveals that these types of claims are a special area of practice with many firms advertising their expertise in the area. *See, e.g.*, Phillips and Cohen, LLP website http://www.phillipsandcohen.com/?source=overture (law firm); Bauman & Rasor Group, Inc. website http://www.quitam.com/id1.html (investigative firm); Qui Tam Online Network website http://www.quitamonline.com (lawyers). These firms, and presumably the clients they represent will be scouring state records to discover and support a claim. Because the state and local investigations and audits are available to the public it would be a simple matter for a would be *qui tam* plaintiff with no independent knowledge of the facts surrounding a false claim to simply monitor state and local investigations and reports, and then file a claim based solely on those reports. In some cases, this may be as easy as going to an online website. The reports of the Pennsylvania Auditor General, for example, are posted online. http://www.auditorgen.state.pa.us, and some reports sent to the federal government are also available online from the Federal Audit Clearinghouse. http://harvester.census.gov/sac/. In other cases, information could be made available by a simple request under a state's version of the Freedom of Information Act. In this case, a North Carolina statute made the report available to the public. N.C.Gen. Stat. §132-1 to-10 (2007). Pennsylvania has a similar statute, the "Right to Know" Law, Pa. Stat. Ann. tit. 65 §66.1 (effective now), Pa. Stat. Ann. tit. 65 §67.101, *et seq.* (effective Jan. 1, 2009), as do other states. The very effort by potential plaintiffs to obtain these records may in itself be harmful. A barrage of

requests for records under a state's Freedom of Information Act for purposes of *qui tam* litigation has the potential to disrupt ongoing investigations.

In addition, these reports and audits, available to the public, in many cases will be performed by independent auditors at the behest of the state rather than by the state agencies themselves. *See* fn 3, *infra*, the states may well be beaten to the courthouse by *qui tam* plaintiffs who take advantage of state work to file suits if the FCA is not read to include state investigations, audits and reports within the category of "public disclosures" barring suits by all but original sources.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA *ex rel.* KAREN T. WILSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AND THE BIOTECHNOLOGY INDUSTRY ORGANIZATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

This *amici curiae* brief in support of Petitioners is filed on behalf of two trade organizations: the Pharmaceutical Research and Manufacturers of America (PhRMA) and the Biotechnology Industry Organization (BIO). PhRMA and BIO represent companies that are devoted to discovering new cures for diseases and ensuring patient access to life-saving and life-enhancing therapies.

PhRMA represents the world's leading research-based pharmaceutical and biotechnology companies, each of which is devoted to inventing medicines that allow patients to live longer, healthier, more productive lives. PhRMA members alone invested an estimated $44.5 billion in 2007 in discovering and developing new medicines. PhRMA advocates for public policies that encourage discovery of important new medicines for patients by pharmaceutical and biotechnology research companies.

BIO is the largest biotechnology organization in the world, providing advocacy, business development and communications services for more than 1,250 members

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The Petitioners have filed a blanket waiver with the Court and the Respondent has consented to the filing of this brief and such consent is being lodged herewith. The parties have been given at least 10 days notice of *amici*'s intention to file.

worldwide. BIO members are involved in researching and developing innovative healthcare, agricultural, industrial and environmental biotechnology products. Corporate members range from entrepreneurial companies developing a first product to Fortune 100 multinationals. BIO also represents state and regional biotech associations, academic centers, venture capital firms, and other service providers to the industry.

Compliance with regulations designed to prevent healthcare fraud is critically important, and *amici's* member companies devote significant resources to internal compliance programs that complement the government's efforts to prevent misconduct. *Amici* fully support appropriate enforcement of the False Claims Act. At the same time, a balance must be maintained, as contemplated by Congress, between encouraging citizens with information otherwise unavailable to the government to come forward and preventing unnecessary litigation that provides no new information to the government.

Amici are concerned that the Fourth Circuit's decision, if not reversed, not only will permit, but actually will encourage, *qui tam* relators to initiate actions without any direct or personal knowledge of the information on which the allegations are based. Indeed, *amici*, whose members are often the targets of *qui tam* suits, anticipate that the Fourth Circuit's decision may well create a new cottage industry wherein individuals rummage through State reports or audits for tenuous allegations of wrongdoing and then file *qui tam* actions based upon the State's own investigative work. *Amici* fear that constantly defending such suits will serve only

to increase their already substantial costs of doing business, which, in turn, may increase pressure on healthcare costs for all Americans and negatively impact patient access to new treatments by impairing industry's ability to develop those treatments. *Amici*, therefore, file this brief in support of the petition for a writ of certiorari.

ARGUMENT

The Fourth Circuit's holding — that the "public disclosure" jurisdictional bar is limited to information in federal, and not State, reports, hearings, audits, and investigations — if allowed to stand, will turn the public disclosure bar on its head and dramatically expand the range of evidence upon which *qui tam* plaintiffs can bring False Claims Act cases in reliance on the government's, rather than their own, investigative work. Such an expansion would lead to substantial unintended and negative consequences for *amici's* members, the patients they serve, and the U.S. healthcare system.

As discussed in Section II below, the most common type of *qui tam* action involves allegations of healthcare fraud. A rule whereby information contained in a publicly-available audit or report prepared by a State pursuant to the federal-state Medicaid program does not trigger the jurisdictional bar will result in initiation of *qui tam* actions in cases where the relator has no direct or personal knowledge of the information on which the allegations are based. Such a rule will encourage the very type of "parasitic" *qui tam* actions that Congress intended to prevent when it enacted the public disclosure jurisdictional bar provision. The Fourth

Circuit's holding, therefore, turns this provision on its head. In construing a provision aimed at encouraging private enforcement lawsuits by those individuals who were either close observers of (or otherwise involved in) the fraudulent activity in such a way as to allow claims by opportunistic plaintiffs who have no personal information to share, the holding of the court below threatens to subvert the clear intent of the statute. Because of the far-reaching implications of such an interpretation, the petition for a writ of certiorari should be granted.

I. The Fourth Circuit's Holding Will Significantly Undermine the Twin Goals of the Public Disclosure Bar.

Congress amended the False Claims Act ("the FCA") in 1986 to include a public disclosure jurisdictional bar. *See* 31 U.S.C. § 3730(e)(4)(A). The twin goals of the provision are (1) to encourage private enforcement of suits by individuals who have personal knowledge of fraudulent activity, and (2) to discourage opportunistic plaintiffs who have no personal information to share. *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649-51 (D.C. Cir. 1994) (describing the twin purposes of the public disclosure bar). Section 3730(e)(4)(A) recognizes three categories of "public disclosure[s]" that will trigger the Act's jurisdictional bar: first, disclosures in a "criminal, civil, or administrative hearing"; second, disclosures in "a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation"; and third, disclosures in "the news media."

As for the first category, the circuit courts are united in holding that a State court proceeding constitutes a public disclosure under the Act. *See United States ex rel. Wilson v. Graham County Soil & Water Conservation District*, 528 F.3d 292, 303 (4th Cir. 2008) (collecting cases). The second category, however, has split the circuits and is the subject of the present certiorari petition. *Compare United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917-18 (9th Cir. 2006) (holding that a State administrative report constitutes a public disclosure), *cert. denied*, 2008 U.S. LEXIS 1142 (2008); *Battle v. Bd. of Regents*, 468 F.3d 755, 762 (11th Cir. 2006) (same); and *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003) (same), *cert. denied*, 540 U.S. 877 (2003), *with United States ex rel. Wilson v. Graham County Soil & Water Conservation District*, 528 F.3d 292, 306 (4th Cir. 2008) (holding that a State administrative report does not constitute a public disclosure); and *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3d Cir. 1997) (same).

As the Fourth Circuit candidly acknowledged, the second category is not limited by its literal language to *federal* reports, hearings, audits, and investigations. (Pet. App. 22a.) That court, however, nevertheless decided to so limit the second category based on its application of the doctrine *noscitur a sociis*. While not repeating here the Petitioners' sound critique of that doctrine and its misapplication by the Fourth Circuit (Pet. 22-26), we point out that the court's reading of the word "federal" into the public disclosure bar would lead to several unintended and anomalous results.

First, numerous *federal* programs have been, and continue to be, adopted based on the "cooperative federalism" model of legislation, i.e., legislation in which the federal government encourages State and local governments to implement its programs. *See, e.g.*, *Schaffer v. Weast*, 546 U.S. 49, 52 (2005) (observing that the Individuals with Disabilities Education Act "is frequently described as a model of cooperative federalism") (citation and internal quotation marks omitted); *New York v. United States*, 505 U.S. 144, 167-68 (1992) (collecting cases demonstrating that "a program of cooperative federalism is replicated in numerous federal statutory schemes[,]" including the Clean Water Act, the Occupational Safety and Health Act of 1970, the Resource Conservation and Recovery Act of 1976, and the Alaska National Interest Lands Conservation Act) (internal citations and quotation marks omitted); *California v. United States*, 438 U.S. 645, 650 (1978) ("If the term 'cooperative federalism' had been in vogue in 1902, the Reclamation Act of that year would surely have qualified as a leading example of it."); *Batterton v. Francis*, 432 U.S. 416, 431 (1977) (noting that the Aid to Families with Dependent Children program involved the "concept of cooperative federalism").

Many of these and other federal-state programs require the States to audit, investigate, and report on compliance with federal law. Take, for example, the Medicaid program, in which many members of *amici* participate and which this Court has observed "is designed to advance cooperative federalism." *Wisconsin Dep't of Health and Human Servs. v. Blumer*, 534 U.S. 473, 495 (2002) (citation omitted). According to the

Centers for Medicare and Medicaid Services ("CMS"), the Medicaid program's aggregate expenditure on prescription drugs in 2006 (the latest historical year for which such data are available) amounted to $19.4 billion. CMS, Office of the Actuary, National Health Expenditure Projections tbl. 11, *available at http://www.cms.hhs.gov/NationalHealthExpendData/03_NationalHealthAccountsProjected.asp.*[2]

The Medicaid program, which provides joint federal and State funding of healthcare for millions of low-income individuals, was launched in 1965 with the enactment of Title XIX of the Social Security Act, as added 79 Stat. 343, 42 U.S.C. § 1396 *et seq. Arkansas Dep't of Health and Human Servs. v. Ahlborn*, 547 U.S. 268, 275 (2006). The statute vests authority for the program's administration in the Secretary of Health and Human Services ("HHS"), who has delegated such authority to CMS.[3] *Id.*

Although States are not required to participate in Medicaid, all of them have chosen to do so. *Id.* The Medicaid "program is a cooperative one; the Federal Government pays between 50% and 83% of the costs the State incurs for patient care, and, in return, the

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2. CMS projects that by 2017, such expenditures will amount to $47.1 billion. CMS, Office of the Actuary, National Health Expenditure Projections tbl. 11, available at http://www.cms.hhs.gov/NationalHealthExpendData/03_NationalHealthAccountsProjected.asp.

3. Prior to 2001, CMS was known as the Health Care Financing Administration (HCFA). *See* 66 Fed. Reg. 35437; *Ahlborn*, 547 U.S. at 275 n.2.

State pays its portion of the costs and complies with certain statutory requirements for making eligibility determinations, collecting and maintaining information, and administering the program." *Id.* (citing 42 U.S.C. § 1396a; footnote omitted). One such requirement is that the State Medicaid agency must audit records of payments to vendors. 42 C.F.R. § 447.202. State Medicaid agencies are also required to have methods for identifying and investigating suspected fraud cases. *Id.* § 455.13. The agency must conduct a preliminary investigation whenever it "receives a complaint of Medicaid fraud or abuse from any source or identifies any questionable practices." *Id.* § 455.14. The agency is required to report to the federal government the number of complaints of fraud or abuse that warrant preliminary investigation. *Id.* § 455.17(a).

After conducting a preliminary investigation, if the State Medicaid agency has reason to believe that a recipient has abused the Medicaid program, the agency must conduct a full investigation. *Id.* § 455.15(c). For each case that warrants a full investigation, the agency must report to the federal government the provider's name and number; the source of the complaint; the type of provider; the nature of the complaint; the approximate range of monetary losses involved; and the legal and administrative disposition of the case. *Id.* § 455.17(b).

Yet, as Petitioners observe, the Fourth Circuit's construction of the public disclosure bar would lead to the anomalous result that a formal report prepared by a State Medicaid official pursuant to federal Medicaid laws and regulations and then widely disseminated would

not trigger the public disclosure bar, while a one-paragraph article in a little-known weekly paper of limited circulation would. (Pet. 24.)

Amici disagree with the position the United States put forward as intervenor in *Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003). In that case, the United States argued that a State Medicaid audit report may not constitute a public disclosure under the federal FCA because "[m]any [S]tate and local reports, audits, and investigations . . . never come to the attention of federal authorities and, accordingly, they do not put the federal government in a position to pursue on its own the fraud they disclose." Br. for U.S. as Intervenor, 2002 WL 32181440, at *38-41 (May 2002).[4] However, as discussed

4. In its *amicus curiae* brief in *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914 (9th Cir. 2006), the United States spends six pages discussing the legislative history of section 3730(e)(4). Br. for U.S. as Amicus Curiae, 2007 WL 4613626, at 9-14 (Dec. 2007). However, John Boese has observed that:

> [A]pplicable legislative history explaining versions not adopted is of little help in deciphering this provision. Because Section 3730(e)(4) was drafted subsequent to the completion of the House and Senate Committee reports on the proposed False Claims Act Amendments, those reports, which contained discussion of altogether different bars, cannot be used in interpreting it. And the sponsors' interpretations of the provision ultimately enacted, which are preserved in the Congressional Record, are spare, often incorrect, and wide-ranging enough to provide some support for almost any construction of its many ambiguities.

John T. Boese, *Civil False Claims and Qui Tam Actions* § 4.02[A], at 4-47 to 4-48 (3rd ed. 2008).

above and in the Eighth Circuit's opinion in *Hays*, the Medicaid program is a cooperative federal-state program that requires the State Medicaid agency to report to the federal government information regarding the State agency's investigations of alleged Medicaid fraud and abuse. *Hays*, 325 F.3d at 988-89. State Medicaid fraud investigations and their outcomes are readily available to Department of Justice attorneys as potential sources of the allegations in FCA suits brought by the government itself. *See id.*; *see also In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117, 1143 (D. Wyo. 2006) ("The Court finds that this State-generated report that investigates gas measurement of gas streams, including those from federal leases, would likely place the federal government on notice of fraudulent activities impacting the federal fisc.").

In keeping with the spirit of cooperative federalism through which Medicaid and many other federal programs operate, State reports addressing allegations of fraudulent conduct in federal or cooperative programs should trigger the jurisdictional bar of section 3730(e)(4)(A). This will serve the Act's twin goals of precluding parasitic *qui tam* suits brought by opportunistic would-be relators that the federal government can itself prosecute without undermining the incentive provided to legitimate whistleblowers to bring claims that the government would be unable to bring on its own. *See, e.g., United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649-51 (D.C. Cir. 1994). By strictly limiting the public disclosure bar to information contained in federal reports, hearings, audits, and investigations, the Fourth Circuit has opened the door to *qui tam* actions based

on information plucked from audits and reports prepared by State actors. As a result, *qui tam* actions may be initiated in cases where the relator has no direct or personal knowledge of the information on which the allegations are based. Ironically, while the Fourth Circuit's decision is based on a doctrine (*noscitur a sociis*) designed to divine congressional intent, its interpretation will encourage the very type of parasitic *qui tam* actions that the public disclosure bar was intended by Congress to prevent.

As Petitioners note, by reading the word "federal" into the public disclosure bar, the Fourth Circuit has potentially undermined the first goal of the public disclosure bar as well, i.e., it may be harder for individuals who have personal knowledge of fraudulent activity to bring *qui tam* suits. Under the first-to-file provision of the Act, the filing of a *qui tam* suit by one plaintiff prevents the filing of a subsequent *qui tam* suit by another plaintiff. 31 U.S.C. § 3730(b)(5). Under the Fourth Circuit's construction of the public disclosure bar, therefore, an individual who closely observed the fraudulent activity could have her *qui tam* action blocked by an individual whose earlier-filed *qui tam* action was based on information found in a State report or audit.

II. The Fourth Circuit's Holding Will Benefit Opportunistic Relators at the Expense of the Public Interest.

For the reasons detailed above, the Fourth Circuit's holding clearly will benefit opportunistic relators. The cost of such an interpretation, however, will be borne by *amici's* members, the patients that they serve, and the U.S. healthcare system at large. If the FCA's public disclosure bar is held to apply only to federal administrative reports, audits, and investigations, *see United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292, 302-03 (4th Cir. 2008); *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3d Cir. 1997), then the continued discovery of, and assurance of patient access to, innovative treatments will be jeopardized.

FCA cases involving alleged healthcare fraud predominate over such cases involving alleged fraud in defense contracting and other industries. *See* Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in out-of-Control Qui Tam Litigation under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1243-49 (Summer 2008). In 2007, 196 qui tam claims were filed alleging healthcare fraud, compared to 66 claims alleging fraud in defense contracting. U.S. Dep't of Justice, Civil Div., Fraud Statistics—Overview, October 1, 1986 - September 30, 2007, at 3-4 (2007), *available at http://www.taf.org/stats-fy-2007.pdf*. In that same year, healthcare fraud *qui tam* cases resulted in approximately $1.1 billion in settlements and judgments, compared to approximately $32 million for *qui tam* claims alleging fraud in defense contracting. *Id.*

Given how much money is at stake with the prospect of collecting treble damages under the FCA, and considering that the healthcare sector is the primary target of would-be relators, the number of such claims in certain jurisdictions would skyrocket if relators could potentially obtain a windfall by reviewing investigation reports prepared by State Medicaid agencies. Forcing pharmaceutical and biotechnology companies to defend against a slew of new *qui tam* claims based on State reports rather than the relator's personal knowledge (coupled with the nature of such claims) would divert time, capital, and other critical resources from companies' research and development efforts and would significantly increase the already substantial costs of developing and marketing new treatments that treat, cure, or prevent so many debilitating and life-threatening diseases and conditions. If the Fourth Circuit's holding dramatically increases the number of *qui tam* suits initiated against pharmaceutical and biotechnology companies – as would be expected – patients may be the ones to suffer.

Furthermore, because FCA cases carry with them the potential for substantial penalties, treble damages, and, even worse, the threat of mandatory exclusion from participating in all federal healthcare programs, pharmaceutical and biotechnology companies may elect to settle many of these new *qui tam* actions almost regardless of merit, rather than assume the risk of litigation. The significant costs associated with the prospect of company settlements ultimately may impact the decisions of individual companies as to how to price their products or how to allocate resources for new research and development projects, with potentially

negative consequences not just for individual patients, but for the broader healthcare system and society at large.

In short, the Fourth Circuit's extra-statutory interpretation of the FCA's public disclosure bar would encourage opportunistic relators at the expense of the public interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

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GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, *ET AL.*,

Petitioners,

v.

UNITED STATES *EX REL.* KAREN T. WILSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether an audit and investigation performed by a State or its political subdivision constitutes an "administrative . . . report . . . audit, or investigation" within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

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IN THE

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INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting a limited and accountable Government, supporting the free enterprise system,

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[1] In accordance with this Court's Rule 37, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were notified of *amici*'s intention to file this brief ten days before the due date. The parties have consented to the filing of this brief, as reflected in letters lodged with the Clerk of the Court.

and opposing abusive enforcement actions and civil litigation by the Government and private litigants. WLF regularly participates in important constitutional and statutory litigation raising these issues.

WLF has appeared before this Court and other federal courts in several cases raising significant issues regarding the civil False Claims Act ("FCA" or "the Act"), 31 U.S.C. § 3729 *et seq*. *See, e.g.*, *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008); *R & F Props. of Lake County, Inc. v. United States ex rel. Walker*, *cert. denied*, 127 S. Ct. 554 (2006); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Boeing Co. v. United States ex rel. Kelly*, *cert. denied*, 510 U.S. 1140 (1994); *Riley v. St. Luke's Episcopal Hosp.*, 196 F.3d 514 (5th Cir. 1999).

In addition, WLF's Legal Studies Division produces and distributes legal public policy publications on numerous topics, including the FCA. *See, e.g.*, J. Andrew Jackson & Edward W. Kirsch, *The* Qui Tam *Quagmire: Understanding the Law in an Era of Aggressive Expansion* (WLF Monograph) (1998); J. Andrew Jackson, *A Law Gone Rogue: Time to Return Fairness to the False Claims Act* (WLF Legal Backgrounder) (Dec. 16, 2005); John T. Boese, *D.C. Circuit Rules on "Reckless Disregard" Under False Claims Act* (WLF Legal Opinion Letter) (Aug. 2008).

The Allied Educational Foundation ("AEF") is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in legal reform and public policy. AEF has appeared as co-*amicus* with

WLF in numerous cases before the Supreme Court on a broad array of public interest and legal policy issues.

Amici curiae submit that, over the last two decades, excessive FCA activity has spawned abusive punitive litigation against businesses, both large and small, to the detriment of those businesses, their employees, and their shareholders as well as to the public at large.

The FCA's *qui tam* provisions encourage private individuals with knowledge of fraud perpetrated against the United States Treasury to come forward and sue on behalf of the United States. To encourage whistleblowers (known as *qui tam* relators) to come forward and expose such fraud, the Government pays a bounty of up to 30% of all recoveries. In other words, the FCA's *qui tam* provisions essentially allow the Government to "purchase" from private individuals the information they may have about fraud on the United States Treasury. *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 309 (5th Cir. 1999).

The potential bounties available under the FCA's *qui tam* provisions make this mechanism susceptible to abuse by opportunistic bounty hunters masquerading as true whistleblowers. One of the most effective bars to such parasitic lawsuits has been the jurisdictional public disclosure bar that Congress crafted in the 1986 amendments to the FCA. This public disclosure bar is a core feature of *qui tam* enforcement of the FCA, and it requires dismissal of *qui tam* suits where the *qui tam* relator's case is based on publicly disclosed

information and the relator is not an original source to the Government.

In holding that state reports, hearings, audits, or investigations can *never* qualify as "public disclosures" for purposes of the FCA's public disclosure bar, the court of appeals below adopted a *per se* rule that is contrary to the text of the statute, the purpose of the public disclosure bar, and the position of a majority of the circuit courts that have considered this question. *Amici* believe that this brief will bring an additional perspective to the issue presented in this case and will assist the Court in determining whether state reports, hearings, audits, or investigations may qualify as "public disclosures" to bar parasitic *qui tam* lawsuits.

REASONS FOR GRANTING THE PETITION

The Question Presented in this case deserves this Court's attention. Two Terms ago, in *Rockwell International Corp. v. United States*, 127 S. Ct. 1397 (2007), this Court addressed the second prong of the FCA's public disclosure bar — the "original source" exception — which allows true whistleblowers to maintain their *qui tam* lawsuits if they have direct and independent knowledge of the fraud alleged in their suit, even if those allegations were already publicly disclosed. With this case, the Court now has the opportunity to continue the work it began in *Rockwell* by bringing further harmony to the FCA's oft-litigated public disclosure bar. Specifically, this case presents the opportunity for this Court to address the first prong of the FCA's jurisdictional public disclosure bar and to clarify what types of disclosures qualify as "public disclosures."

The particular issue before this Court is undoubtedly the subject of a clear conflict among the courts of appeals. Two circuits, the Third Circuit and the Fourth Circuit (in the case below), have held that state reports, audits, or investigations never can serve as "public disclosures" for purposes of the FCA's public disclosure bar. *See United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 745-46 (3d Cir. 1997); *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292, 306-07 (4th Cir. 2008). The Eighth, Ninth, and Eleventh Circuits have reached the opposite conclusion and have held that state reports, audits, or investigations can qualify as "public disclosures." *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917-18 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 1119 (2008); *Battle v. Bd. of Regents*, 468 F.3d 755, 762 (11th Cir. 2006); *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir.), *cert. denied*, 540 U.S. 877 (2003). This conflict among the circuits is fresh, and only this Court can resolve it.

Moreover, the Solicitor General agrees that this issue deserves the attention of this Court. During the last two Terms, this Court considered a petition for certiorari to the Ninth Circuit raising essentially the same issue now presented in this case. *See* Pet. for Writ of Certiorari, *United States ex rel. Bly-Magee v. Premo* (No. 06-1269) (filed Mar. 16, 2007) (presenting the question whether "an audit performed by a state agency is an 'administrative . . . audit'" within the meaning of the FCA's public disclosure bar). By invitation of the Court, the Solicitor General filed an *amicus* brief acknowledging the importance of this question and noting the conflict among the circuits, but ultimately

recommending against granting that petition so that the Court could "await further development of the issue in the lower courts" and because the resolution of the public disclosure issue likely would not have affected the outcome in that case. Br. of the United States as *Amicus Curiae*, *United States ex rel. Bly-Magee v. Premo* (No. 06-1269) (filed Dec. 21, 2007) at 18-20. This Court ultimately denied the petition. *See Bly-Magee*, 128 S. Ct. 1119.

The Court should no longer defer the resolution of this issue. This case raises an important jurisdictional issue for *qui tam* enforcement of the FCA. In *Rockwell*, this Court confirmed that the FCA's public disclosure bar is jurisdictional and, thus, goes to the very heart of a federal court's competence to hear a *qui tam* suit. *See* 127 S. Ct. at 1405-06; *see also Schumer*, 520 U.S. at 951. None of the concerns for the Solicitor General's recommendation to deny certiorari in the *Bly-Magee* case are present here. And, here, the decision below is demonstrably wrong. It carves out an entire category of potential "public disclosures" even though the information was undoubtedly "public" and indisputably "disclosed." It allows certain *qui tam* cases to go forward even where Congress intended to strip federal courts of jurisdiction to hear those cases. This Court should grant review in this case and restore the FCA's public disclosure bar to its proper understanding.

I. THE PUBLIC DISCLOSURE BAR WAS INTENDED TO PREVENT PARASITIC LAWSUITS BY *QUI TAM* RELATORS WHO LEARNED OF FRAUD THROUGH PUBLIC SOURCES

"The history of the FCA qui tam provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994). In 1986, after over 100 years of living with two very different extremes — one (before 1943) that allowed parasitic *qui tam* relators to cut and paste (literally) allegations from the Government's own pleadings and another (after 1943) that disallowed *qui tam* suits where the Government had knowledge of the information even if the relator was the Government's source — Congress forged a more balanced approach to screening for proper *qui tam* relators when it enacted the "public disclosure" bar codified in 31 U.S.C. § 3730(e)(4).

This provision states in full:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [sic] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).[2]

To understand fully what this provision was designed to do, it is important to understand the history of the FCA's *qui tam* provisions and what led Congress to include the public disclosure bar in the 1986 amendments.

As originally drafted, the FCA's *qui tam* provisions were very permissive, as well illustrated by *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), in which an enterprising *qui tam* relator made a direct copy of a criminal indictment, incorporated those allegations in a civil action under the FCA, and requested his statutory share (then half) of any subsequent civil judgment. *Id.* at 545. The relator ultimately prevailed in this Court based on the text of the statute at the time. In response, Congress quickly amended the FCA to bar *qui tam* actions "based on evidence or information the Government had when the action was brought." Act of Dec. 23, 1943, Pub. L. No. 78-213, ch. 377, 57 Stat. 608.

Nearly 40 years later, the pendulum had swung the other way, as illustrated in *United States ex rel.*

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[2] An "original source" for purposes of Section 3730(e)(4) is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). *See Rockwell*, 127 S. Ct. at 1403. The "original source" analysis is wholly separate from the public disclosure analysis and only comes into play if there indeed is a "public disclosure" within the meaning of Section 3730(e)(4)(A).

State of Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984). In that case, the court of appeals refused to allow the State of Wisconsin to act as a *qui tam* relator in a Medicaid fraud action (even though the investigation had been conducted solely by Wisconsin and the Federal Government learned of the fraud only because Wisconsin had reported it) because, the court held, the FCA barred *qui tam* actions "whenever the government has knowledge of the 'essential information upon which the suit is predicated' before the suit is filed, even when the plaintiff is the source of that knowledge." *Id.* at 1103.

Whereas the *Marcus* case was responsible for the 1943 amendments to the FCA, the *Dean* case was a key motivator for the 1986 amendments. Nevertheless, there should be no doubt that Congress was keenly aware of both extremes — as illustrated by the *Marcus* and *Dean* cases — and that this awareness significantly shaped what would become the public disclosure bar in the 1986 amendments to the FCA. As the Third Circuit has observed, with the 1986 amendments, Congress's "principal intent . . . was to have the *qui tam* suit provision operate somewhere between the almost unrestrained permissiveness represented by the *Marcus* decision . . . and the restrictiveness of the post-1943 cases, which precluded suit even by original sources." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991) (internal citations omitted).

Thus, while the immediate impetus for Congress to add the public disclosure bar to the FCA in 1986

was the *Dean* decision, it must be recognized that, in stepping back from that extreme, Congress endeavored to avoid a return to the other equally undesirable extreme — allowing parasitic *qui tam* relators to bring suits based on information readily available to the Government or the public. The new public disclosure bar was designed, as one court has explained, to obtain "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995) (internal quotation marks and citation omitted); *see also United States v. Bank of Farmington*, 166 F.3d 853, 858 (7th Cir. 1999) ("Congress intended that the courts not be troubled by persons who wish to capitalize on others' discovery of frauds to the exposure of which they themselves have in no way contributed."); *United States ex rel. Devlin v. State of Cal.*, 84 F.3d 358, 362 (9th Cir. 1996) (public disclosure bar intended "to bar parasitic suits through which a plaintiff seeks a reward even though he has contributed nothing significant to the exposure of fraud").

Under Section 3730(e)(4)(A), the first step in the public disclosure inquiry is for a court to determine whether the *qui tam* relator's complaint is based on allegations or transactions that have been publicly disclosed. Several circuit courts have noted that this initial analysis is meant to be a "quick trigger" test that, if necessary, will lead to the more nuanced "original source" analysis required under Section 3730(e)(4)(B). *See Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1476 n.18 (9th Cir. 1996);

Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 568 n.10 (11th Cir. 1994) (per curiam); *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 552-53 (10th Cir. 1992). For this reason, courts have held that a "public disclosure" need only be sufficient to have "set the government squarely on the trail of the alleged fraud," *Fine*, 70 F.3d at 571, or to have raised the "specter of 'foul play,'" *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 687 (D.C. Cir. 1997), in order to trigger the public disclosure bar.

II. THE FOURTH CIRCUIT'S *PER SE* RULE IS CONTRARY TO THE TEXT AND PURPOSE OF THE PUBLIC DISCLOSURE BAR AND MUST BE REJECTED

The FCA's public disclosure bar only comes into play if the purported disclosure qualifies as a "public disclosure." Section 3730(e)(4)(A) sets forth the following categories of "public disclosures":

Category 1: "a criminal, civil, or administrative hearing";

Category 2: "a congressional, administrative, or Government [sic] Accounting Office report, hearing, audit, or investigation"; or

Category 3: "the news media."

31 U.S.C. § 3730(e)(4)(A). The interpretation adopted by the court of appeals below creates a bright line rule for Category 2: The court prohibits a *state* audit report or investigation from qualifying as a "public disclosure" regardless of any other factors,

including the scope, nature, subject, or circulation of the state report.

The principal basis for the Fourth Circuit's *per se* rule was the court's mistaken belief that the doctrine of *noscitur a sociis* required the adjective "administrative" in Category 2 to mean "federal administrative," thus restricting Category 2 only to federal "administrative . . . reports, hearings, audits, or investigations." *Wilson*, 528 F.3d at 302. The court also reasoned that the public disclosures identified in Category 2 should be limited to "federal" sources because of the purpose behind the public disclosure bar. *Id.* at 302-07. Respectfully, the Fourth Circuit's statutory analysis is flawed and its understanding of the purpose of the public disclosure bar incomplete.

A. THE RULES OF STATUTORY CONSTRUCTION SHOULD NOT BE USED TO DIVORCE THE PUBLIC DISCLOSURE BAR FROM ITS PURPOSE

In concluding that the term "administrative" in Category 2 must mean "federal administrative," the Fourth Circuit (as did the Third Circuit before it) erroneously applied the doctrine of *noscitur a sociis* — that a statutory "phrase 'gathers meaning from the words around it.'" *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). Looking at the three examples in Category 2, the Fourth Circuit reasoned that "administrative" must mean "federal administrative" because the other two examples, "congressional" and "Government Accounting Office,"

clearly were federal sources. *Wilson*, 528 F.3d at 302-03.

Respectfully, this approach misses the forest for the trees. Although it is true that a "word may be known by the company it keeps," this Court has also admonished that the doctrine of *noscitur a sociis* is "not an invariable rule, for the word may have a character of its own not to be submerged by its association." *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923). Moreover, in applying this rule to Category 2, the court of appeals also should have taken into account what Congress was trying to accomplish with *all three categories* of "public disclosures" set forth in Section 3730(e)(4). *See Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990) ("Thus, the phrase 'any note' should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts."). It is, in fact, the broader understanding of Category 2 adopted by the Eighth, Ninth, and Eleventh Circuits that "accords with the broad purposes of the legislation." *Russell Motor Car Co.*, 261 U.S. at 521.

In this case, the Fourth Circuit's narrow focus on the purported "federal" nature of the three examples in Category 2 completely ignores the thrust of all of the categories of "public disclosures" in Section 3730(e)(4)(A). Although the Fourth Circuit acknowledged that neither Category 1 nor Category 3 was limited to "federal" sources, the court's analysis gave short shrift to the expansiveness of those two categories.

Lower courts have almost universally interpreted Category 1 and Category 3 to be quite broad in their application. The circuit courts are in agreement that Category 1 includes both state and federal sources. *See, e.g., United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 330, 333 (3d Cir. 2005); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1341, 1350 (4th Cir. 1994); *United States ex rel. Reagan v. East Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 174 (5th Cir. 2004); *United States ex rel. Gilligan v. Medtronic, Inc.*, 403 F.3d 386, 390 (6th Cir. 2005); *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1161 n.6 (10th Cir. 1999). Indeed, even though the text of Category 1 states that it applies only to "criminal, civil or administrative *hearings*," the lower courts have interpreted this to cover not only actual *hearings* but all proceedings or other aspects of a court case, whether state or federal. *See, e.g., A-1 Ambulance Serv., Inc. v. State of Cal.*, 202 F.3d 1238, 1243-44 (9th Cir. 2000); *Springfield Terminal*, 14 F.3d at 652. The Third Circuit, which along with the Fourth Circuit has read Category 2 to be limited to federal sources, has gone so far as to interpret the term "hearing" in Category 1 to encompass discovery materials exchanged by private parties to a litigation, even when those materials are not filed with the court and are, thus, not part of the public court record. *See Stinson*, 944 F.2d at 1158-60.

Similarly, the term "news media" in Category 3 has not been interpreted narrowly. The lower courts have defined "news media" to mean any published information disseminated to the public in a "periodic manner." *E.g., United States ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.*, 186

F. Supp. 2d 458, 463 (S.D.N.Y.), *aff'd*, 53 F. Appx. 153 (2d Cir. 2002). In applying this definition, courts have had little trouble concluding that "news media" encompasses not only major national daily newspapers, such as the *New York Times* and the *Wall Street Journal*, but also regional newspapers, including the *Lansing State Journal*, the *Syracuse Herald*, and even unspecified "news media" in Nassau and Suffolk Counties (New York). *See, e.g.*, *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476 (2d Cir. 1995); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 14 (2d Cir. 1990); *United States ex rel. Dingle v. Bioport Corp.*, 270 F. Supp. 2d 968, 977 (W.D. Mich. 2003). Courts have also interpreted this category to include a broad array of news outlets besides traditional newspapers.

But courts have gone further. They have also construed "news media" to encompass publications with a limited circulation, such as scientific, scholarly, or technical publications. For example, in *Alcohol Foundation*, the district court *agreed with the Government* that the relator's allegations had been publicly disclosed in scientific publications that the relator claimed were "too technical for the average member of the public to understand" and were distributed to a small, professionally specialized reader base. 186 F. Supp. 2d at 463. In rejecting the relator's narrow reading of the term "news media," the court noted that a similarly "cramped" interpretation of "hearing" had been rejected based on a plain reading of the public disclosure bar and reasoned that

> [n]o principle of statutory construction or public policy would compel a cramped reading of the term "news media" or the imposition of a judicially created limit on "news media" to encompass only the newspaper context.

Id. (citing *A-1 Ambulance*, 202 F.3d at 1244).

In *Dunleavy*, the Third Circuit (much like the Fourth Circuit in this case) found it "hard to believe that the drafters of [Category 2] intended the word 'administrative' to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character." 123 F.3d at 745. But the force to this observation falls away when one considers the placement of Category 2 — sandwiched as *it* is between Category 1 and Category 3, neither of which is limited to "federal" sources. Given the generally broad application of Categories 1 and 3, it simply defies logic and common sense to impose a reading of Category 2 that is so dramatically different from these other two.

B. ELIMINATING STATE SOURCES FRUSTRATES ONE OF THE PURPOSES OF THE PUBLIC DISCLOSURE BAR

Although the Fourth Circuit claimed that limiting Category 2 to federal sources was faithful to the intent of Congress, *Wilson*, 528 F.3d at 302-07, this claim cannot withstand scrutiny.

The main thrust of the Fourth Circuit's reasoning for limiting Category 2 to federal sources was that "[i]nformation about federal investigations and

audits is easily available to the members of the Department of Justice charged with enforcing the FCA" and because "the federal government is unlikely to learn about state and local investigations." *Wilson*, 528 F.3d at 306. Thus, the court reasoned, "a large number of fraudulent claims against the government would go unremedied without the financial incentives offered by the *qui tam* provisions of the FCA." *Id.* These concerns reflect, at best, only half of what Congress was concerned with in 1986 when it forged the public disclosure bar. Indeed, although Fourth Circuit's analysis focused on the public disclosure bar's role in preventing parasitic *qui tam* suits based on information available to the Federal Government (in other words, overturning *Dean*), that singular focus fails to account for Congress's other goal — to avoid a return to *Marcus* by also preventing "potential . . . parasitic lawsuits by those who learn of the fraud through public channels." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 319 (2d Cir. 1992).

There is, moreover, no explicit or implicit requirement in Section 3730(e)(4)(A) that the disclosure actually be known or transmitted — or even readily available — to the Federal Government for it to qualify as a "public disclosure." Certainly, as a practical matter, there is no reason to think that federal officials are conducting routine Nexis-Lexis searches for news media accounts exposing potential fraud on the federal fisc. Nevertheless, for purposes of Category 3, a full-fledged exposé of a scheme to defraud the Government splashed across the front page of the *Washington Post* is just as much a "public disclosure" as a full-fledged exposé of a scheme to defraud the Government appearing on

page 5 of the "Metro" section of the *Topeka Capital-Journal*. Ready access to the "public disclosure" by federal officials in Washington or elsewhere is just not part of the test created by Congress.

C. IT IS ENTIRELY APPROPRIATE FOR STATE SOURCES TO QUALIFY AS "PUBLIC DISCLOSURES"

There is no injustice or unfairness in allowing state-originated materials to qualify as "public disclosures." For the public disclosure bar to be triggered, the disclosure must not only qualify as a "public disclosure" under Section 3730(e)(4)(A), but the disclosure also must have been actually *made public* by being "publicly disclosed." 31 U.S.C. § 3730(e)(4)(A). State-originated materials can be just as "public" and just as "disclosed" as many federal reports, hearings, audits, or investigations. On the other hand, an obscure state audit report buried in a desk drawer would be no more "public" than a newspaper article that never got published. *Cf. United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1519 (10th Cir. 1996) (observing that an independently prepared report that is merely present in state agency files and not revealed to others does not qualify as a "public disclosure").

At the same time, the Fourth Circuit's *per se* ban against state-generated "public disclosures" would allow truly parasitic *qui tam* suits to go forward. For example, in *Battle*, the Eleventh Circuit confronted a case in which the *qui tam* relator, a former university employee, filed an FCA suit against individual university administrators for alleged

fraudulent activities in connection with the Federal Work Study Program. 468 F.3d at 758. According to the Eleventh Circuit, the relator's FCA allegations relied "chiefly on information that was publicly disclosed" in audit reports issued by the Georgia Department of Audits. *Id.* at 762. These independent audits by the Georgia Department of Audits "revealed serious noncompliance with federal regulations and risk factors for fraud." *Id.* at 759. In 2002, the university reached a $2.17 million settlement with the U.S. Department of Education "to settle questioned costs identified by the state auditors in audits from 1997-2000 and in lieu of further file review." *Id.*

In the district court, the relator "referred Defendants to the audits performed by the State of Georgia Department of Audits and Accounts" and sought "all damages allowed under the False Claims Act for these violations." *Id* at 762. This blatant attempt by the relator to obtain a share of the Government's damages by simply echoing the fruits of an official investigation sounds eerily familiar to the scenario in *Marcus*, where the *qui tam* relator simply cut and pasted the allegations from a criminal indictment into his FCA complaint and requested half of any subsequent civil judgment. *See Marcus*, 317 U.S. at 545. Yet, under the Fourth Circuit's *per se* rule, a case based on state audit reports could always go forward because the public disclosure bar would not be triggered. The Eleventh Circuit, on the other hand, had no difficulty concluding in *Battle* that the state report satisfied the public disclosure bar in Section 3730(e)(4)(A) and, thus, affirmed the dismissal of the relator's FCA claims. 468 F.3d at 763.

D. INTERPRETING THE PUBLIC DISCLOSURE BAR TO INCLUDE STATE SOURCES HAS NO EFFECT ON ENFORCEMENT OF THE FCA, NOR DOES IT DISCOURAGE TRUE WHISTLEBLOWERS FROM FILING FCA SUITS

Allowing state reports, hearings, audits, and investigations to qualify as "public disclosures" has no effect whatsoever on the *Government*'s ability to pursue FCA cases. Actions under the FCA may be initiated by the Attorney General or by a *qui tam* relator. *See* 31 U.S.C. §§ 3730(a) & (b). In addition, the Government may intervene in an action initially brought by a relator, thereby taking over the suit. *Id.* § 3730(b)(4)(A). As this Court has noted, the jurisdictional nature of the public disclosure bar has no impact on the ability of the United States to pursue an FCA action, whether the Attorney General initially brought the case or whether the Government choses to intervene in a case filed by a *qui tam* relator. *See Rockwell*, 127 S. Ct. at 1411.[3]

So, too, allowing state reports, hearings, audits, and investigations to qualify as "public disclosures"

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[3] It also should be noted that more than 95% of the recoveries in FCA cases arise in cases in which the Department of Justice either intervenes in a *qui tam* case or initiates a case on its own. *See, e.g.*, U.S. Gov't Accountability Office, GAO-06-320R, *Information on False Claims Act Litigation*, at 35 (2006), *available at* http://www.gao.gov/new.items/d06320r.pdf (analyzing FCA case data from the Department of Justice for Fiscal Years 1987-2005).

should have no effect on true whistleblowers. This is so because a finding that a *qui tam* relator's claims are based on a "public disclosure" is only the first part of the public disclosure analysis. Under the "original source" exception, even a *qui tam* suit based on a "public disclosure" can go forward if the *qui tam* relator is a true whistleblower and "has direct and independent knowledge" of the alleged fraud. 31 U.S.C. § 3730(e)(4).

E. GUIDANCE FROM THIS COURT WILL HELP CLARIFY THE PUBLIC DISCLOSURE BAR FOR THE COURTS AND FOR LITIGANTS

Finally, although the Question Presented in this case is relatively straightforward, any guidance from this Court on what constitutes a "public disclosure" under Section 3730(e)(4) would be a welcome development and an important step in bringing some uniformity to the often divergent interpretations of other aspects of the FCA's public disclosure bar. The Federal Reporter and Federal Supplement are chock-full of conflicting interpretations of the FCA's public disclosure bar; the federal versus state source distinction highlighted in this case is but one example.

These differing and conflicting interpretations of the public disclosure bar produce arbitrary results. As noted by Petitioner, a public audit report generated by a state agency and detailing a fraudulent scheme will qualify as a "public disclosure" in a case pending in Georgia, but not across the border in South Carolina. *See* Pet. at 18. In a similar vein, the response to a citizen's FOIA request to a federal agency can qualify as a "public

disclosure" in an FCA case pending in Pennsylvania, but probably not in California. *Compare United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 383 (3d Cir. 1999) (Alito, J.), *with United States ex rel. Haight v. Catholic Healthcare West*, 445 F.3d 1147, 1155-56 (9th Cir. 2006). Although the Court would not be in a position to resolve all of these conflicting interpretations by granting the petition in this case, the Court's guidance certainly can help bring an end to such arbitrary and disparate results *on questions of jurisdiction* based solely on geography.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

138 (12)

No. 08-304

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In the *Supreme Court of the United States*

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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NOTICE

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the Appendix to the Petition for *Writ of Certiorari*:

Memorandum of the United States
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Decided March 13, 2007
(*United States of America ex rel. Wilson v. Graham County Soil & Water Conservation District*, (2:01CV19)) . . . . . Pet. App. 47a

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2:01CV19T, United States District Court, Western District of North Carolina

DATE	DOCKET NUMBER	PROCEEDINGS
1/25/2001	1	COMPLAINT Filing Fee $150.00 Receipt # 16464 (sdc) [Entry date 01/29/01]
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12/01/2006	233	Memorandum in Support re Motion for Summary Judgment filed by Keith Orr
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12/04/2006	235	Supplemental Memorandum by Keith Orr as to Motion for Summary Judgment
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12/04/2006	239	Supplemental Memorandum by Billy Brown as to Motion for Summary Judgment
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6/09/2008	68	Judgment Order filed. Decision: Vacated and Remanded

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UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NORTH CAROLINA BRYSON CITY DIVISION

UNITED STATES EX REL. KAREN T. WILSON
Plaintiffs,

v.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, GRAHAM COUNTY, CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT, RICHARD GREENE, in his individual capacity, WILLIAM TIMPSON, in his individual capacity, KEITH ORR and GERALD PHILLIPS, in their individual and official capacities, RAYMOND WILLIAMS, in his official capacity, DALE WIGGINS, in his official capacity, ALLEN DEHART, in his official capacity, LLOYD MILLSAPS, in his official capacity, JERRY WILLIAMS, in his individual capacity, BILLY BROWN, in his individual capacity, LYNN CODY, in his official capacity, BILL TIPTON, in his official capacity, C.B. NEWTON, in his official capacity, and EDDIE WOOD, in his official capacity.
Defendants.

CIVIL ACTION NO.:2:01CV19T
Jury Trial Requested

THIRD AMENDED COMPLAINT

1. This is an action by *qui tam* Relator **Karen T. Wilson**, in the name of the United States Government, to recover penalties and damages arising from false claims for money submitted to the United States

Government. She is an "original source" of the information on which the allegations contained hereto are based, as that term is defined in 31 U.S.C. §3730(e)(4).

Jurisdiction And Venue

2. This action arises under the False Claims Act, 31 U.S.C. § 3729 *et seq*. This Court has subject matter jurisdiction over this action pursuant to 31 U.S.C. 3732(a) and 28 U.S.C. § 1331 in that this action arises under the laws of the United States.

3. Venue is proper in the United States District Court for the Western District of North Carolina pursuant to 28 U.S.C. §§ 1391(b), and 1391(c), and under 31 U.S.C. 3732(a) because at least one or more of the defendants can be found, resides and/or transacts business within the district, and the acts proscribed by the False Claims Act occurred within the district.

The Parties

4. Relator **Karen T. Wilson** is a citizen and resident of the United States and North Carolina and resides in the Western District of North Carolina. She formerly was employed by Defendant Graham County Soil and Water Conservation District.

5. **Defendant Graham County Soil & Water Conservation District** is a local special-purpose governmental entity located in and servicing Graham County, North Carolina (hereinafter referred to as "Graham County SWCD").

6. Defendant **Graham County** is the political entity that governs Graham County, North Carolina (hereinafter referred to as "Graham County").

7. Defendant **Cherokee County Soil & Water Conservation District** is a local special-purpose governmental entity located in and servicing Cherokee County, North Carolina (hereinafter referred to as "Cherokee County SWCD").

8. Defendant **Richard Greene** is a citizen and resident of the United States and was an employee of the Natural Resources Conservation Service (hereinafter referred to as "NRCS").

9. Defendant **William Timpson** is a citizen and resident of the United States and was an employee of the NRCS.

10. Paragraph not used.

11. Defendant **Keith Orr** is a citizen and resident of the United States and was an employee of the Graham County SWCD.

12. Defendant **Gerald Phillips** is a citizen and resident of the United States and was a Supervisor of the Graham County SWCD at all relevant times.

13. Defendant **Allen Dehart** is a citizen and resident of the United States and was a Supervisor of the Graham County SWCD at all relevant times.

14. Defendant **Lloyd Millsaps** is a citizen and resident of the United States and was a Supervisor of the Graham County SWCD at all relevant times.

15. Defendant **Jerry Williams** is a citizen and resident of the United States.

16. Defendant **Billy Brown** is a citizen and resident of the United States. Upon information and belief, at all relevant times he was doing business as Brown Construction Company.

17. Defendant **Dale Wiggins** is a citizen and resident of the United States and was a Commissioner of Graham County at all relevant times.

18. Defendant **Raymond Williams** is a citizen and resident of the United States and was a Commissioner of Graham County at all relevant times.

19. Defendant **Lynn Cody** is a citizen and resident of the United States and was a Commissioner of Graham County at all relevant times.

20. Defendant **Bill Tipton** is a citizen and resident of the United States and was a Supervisor of the Cherokee County SWCD at all relevant times.

21. Defendant **C.B. Newton** is a citizen and resident of the United States and was a Supervisor of the Cherokee County SWCD at all relevant times.

22. Defendant **Eddie Wood** is a citizen and resident of the United States and was a Supervisor of the Cherokee County SWCD at all relevant times.

23. Each defendant who is alleged herein to be or to have been either a Commissioner of Graham County or a Supervisor of the Graham County SWCD is being sued in his personal capacity for his actions taken as a member of the respective entity and/or for the actions of that entity that are alleged herein, as well as for any other actions taken by the defendant that are alleged herein. Upon information and belief, each such defendant participated in all of the actions that the respective entity is alleged herein to have taken. Specifically, in the case of Graham County SWCD, where, as is alleged below, that Graham SWCD approved payments and otherwise approved actions that constituted False Claims Act violations, upon information and belief, each defendant supervisor, including Millsaps, voted in favor of those payments or otherwise indicated his assent knowing that the payments or approvals were improper, constituted

false claims, or assisted in the submission of false claims.

24. Each defendant who is alleged herein to be or to have been a Supervisor of the Cherokee County SWCD is being sued in his personal capacity for his actions taken as a member of the respective entity and/or for the actions of the respective entity of which he is a member that are alleged herein. Upon information and belief, each such defendant participated in all of the actions that the respective entity is alleged herein to have taken. Specifically, when Cherokee County SWCD approved payments and otherwise approved actions that constituted False Claims Act violations as is alleged below, upon information and belief, each defendant supervisor, including Newton, Tipton and Wood, voted in favor of those payments or otherwise indicated his assent knowing that the payments or approvals were improper, constituted false claims, or assisted in the submission of false claims.

25. Graham County, Graham County SWCD, Cherokee County SWCD, and their respective members who are named as defendants herein may hereafter be referred to as the "Governmental Defendants."

Factual Allegations

26. Defendants have violated the False Claims Act by perpetrating and participating in, and conspiring to

participate in, various schemes to defraud the United States Government under financial aid programs for farmers and other landowners located in certain counties in western North Carolina, principally in the counties of Graham, Cherokee and Clay.

A. False Claims Under The Federal Emergency Watershed Protection Program

27. On January 18, 1993, Relator Wilson was hired as a part-time secretary at the Graham County SWCD.

28. Pursuant to the Emergency Watershed Protection Program, a disaster relief program funded by the United States Government, a grant program known as EWP-216 was instituted for Graham, Cherokee and Clay Counties in North Carolina for assistance for damages to streams and creeks caused by a storm in February 1995.

29. Defendant Keith Orr was appointed an inspector of the EWP-216 program by the Graham County SWCD.

30. Defendants presented false claims and/or made or caused to be made false records or statements to get false claims paid and/or conspired to defraud the United States Government by getting false or fraudulent claims paid under the EWP-216 program, thereby defrauding the United States Government.

31. Defendants' actions in this regard include the following:

a. In a June 20, 1995 Graham County SWCD board meeting, Keith Orr presented the district a request for payment of $5,130 for EWP-216 work knowing that the claim was improper because he was ineligible to receive funds under the program because of his conflict of interest as inspector and because there had been no bidding on the contract as required by the EWP-216 program.

b. The Graham County SWCD board approved the payment and had it paid, despite knowing that the claim was improper for the aforementioned reasons, and requested from Graham County the corresponding EWP-216 funds.

c. Subsequent to this claim, in 1995 and 1996 Keith Orr made several other improper requests for payment under the EWP-216 program utilizing the same procedures, which payments were approved by the Graham County SWCD board and Graham County, despite their knowledge of their impropriety. These included the following: on August 31, 1995 a check for $6,725.00 was issued to Keith Orr; on October 4, 1995 a check for $2,700.00 was issued to Keith Orr for an EWP-216 contract which did not exist; on July 12, 1996, a check was issued to Keith Orr for $1957.50 by Graham County Commissioners with a notarized statement by Sharon Crisp, Graham

County Finance Officer, addressed to Graham County Commissioners Raymond Williams, Lynn Cody and Dale Wiggins stating that she was issuing the check "under duress and against [her] will and better judgment."

d. Gerald Phillips, a Graham County SWCD supervisor, conspired with Orr and others to get Orr's false claims paid and instructed Relator Wilson that she should pay Keith Orr's claims whether or not Orr had done the work or not. Actions in furtherance of the conspiracy included the holding of an illegal, closed board meeting of the Graham County SWCD on or around July, 1996 by Phillips with fellow board members Allen Dehart and Ronald Orr, along with Richard Greene, William Timpson and Keith Orr to plan and discuss the same.

e. In addition to the above-noted improprieties with Orr's claims, the claims were improper because Keith Orr had not performed some or any of the work for which he filed claims for payment and for which he was paid.

f. Keith Orr conspired with Richard Greene and William Timpson to file the aforementioned false claims and to share the payments from the claims among the three of them.

g. They also secretly and improperly sold logs and timber that they removed from landowners'

property as part of the EWP-216 Program, and split the illegal proceeds. These sales included sales to the ValWood Corporation with the following details:

Delivery Date	Amount Paid	Check No.
July 20, 1995	$341.70	2530
July 24, 1995	$376.21	2598
July 26, 1995	$420.75	2608
July 27, 1995	$116.45	2617
Aug.15, 1995	$100.47	2855
Sept. 28-29,1995	$540.77	3439
Oct. 30, 1995	$222.02	3827
Nov. 10-13, 1995	$136.51	1546
May 31, 1995	$89.42	1933
Oct. 10-11, 1995	$229.50	3561
May 31, 1995	$89.42	1934
May 31, 1995	$44.37	1937
May 31, 1995	$44.37	1938
Aug. 10, 1995	$84.49	2791
Aug. 21, 1995	$116.26	2939
Oct. 11, 1995	$96.56	3562
Oct. 12, 1995	$355.13	3571
Oct. 13, 1995	$193.80	3595
Oct. 19, 1995	$100.64	3663
Oct. 20, 1995	$88.74	3702

h. Sub-paragraph not used.

i. Upon information and belief, Richard Greene and William Timpson approved all of the payments made by NRCS, a branch of the United

States Government, pursuant to the EWP-216 program, that ultimately went to Keith Orr, despite knowing that the claims of Orr were false and improper.

j. Keith Orr, Richard Greene, William Timpson, Billy Brown and Brown Construction Company conspired to make similar false claims under the EWP-216 program for Clay and Cherokee Counties and split the proceeds from the false claims.

k. They did make such false claims and receive payment for them.

l. The Cherokee County SWCD, knowingly made false claims to the NRCC based on the aforementioned claims, which resulted, upon information and belief, from the vote or assent of each defendant supervisor, including Newton, Tipton and Wood, who approved the claims by voting in favor of them knowing that they were false, which included claims for which they made the following payments:

— To Billy Brown

Date of Check	Check No.	Amount of Check
May 31, 1995	2804	$3,834
June 16, 1995	149	$3,834
June 27, 1995	150	$2,997
July 20, 1995	151	$6,048
Aug. 15, 1995	156	$2,133
Sept. 21, 1995	158	$1,728
Sept. 28, 1995	160	$1,188
Oct. 4, 1995	163	$1,134
Oct. 19, 1995	166	$1,269
Nov. 2, 1995	170	$1,242
Nov. 16, 1995	173	$1890
Sept 21, 1995	159	$210
Sept. 28, 1995	161	$4,889
Oct. 4, 1995	162	$3.675
Oct. 19, 1995	167	$8,400
Oct. 26, 1995	168	$8,484
Nov. 2, 1995	169	$8988
Nov. 16, 1995	174	$9,072

— To Keith Orr:

Date of Check	Check No.	Amount of Check
Oct. 25, 1995	164	$1,242
Oct. 12, 1995	165	$6,390
Nov. 9, 1995	171	$1,134
Nov. 9, 1995	172	$4,095

m. Cherokee County SWCD attempted to conceal these improper payments, which attempts

included its chairman Lloyd L. Kisselburg (now deceased) making a false official written denial on December 7, 1995 on behalf of the Cherokee County SWCD to Chairman Bruce Lewis of Graham County SWCD that any such payments to Keith Orr were made.

n. Cherokee County SWCD and Cherokee County committed additional violations of the False Claims Act by making false claims to the NRCC under the EWP-216 program by submitting claims for payments to unauthorized claimants, for payments based on claims for which there was no bidding although bidding was required under the program, and by otherwise paying for claims with the knowledge that the payments were improper.

o. Upon information and belief, Graham County, Graham County SWCD, Cherokee County, Cherokee County SWCD and the members thereof took the improper actions described above in order to curry political and personal favor from the individual recipients of the ill-gotten funds and their family, friends and associates and thereby did obtain and enjoy such personal and political gain.

p. Relator Wilson is unable to plead with more specificity and particularly with respect to this false claims because the necessary information is in the control of and/or in the hands of the some of the Defendants.

B. False Claims Under Farm Services Agency Programs

32. The Farm Services Agency (FSA) programs, also known as ASCS programs, included programs for cropland and farmland improvement.

33. Upon information and belief, the FSA programs were funded, at least in part, with federal funds.

34. The federal technicians for the FSA programs for Graham County, and upon information and belief, the surrounding counties in North Carolina, were Richard Greene and William Timpson.

35. Defendants presented false claims and/or made or caused to be made false records or statements to get false claims paid and/or conspired to defraud the United States Government by getting false or fraudulent claims paid under FSA programs.

36. Defendants' actions in this regard include the following:

a. Richard Greene applied for and obtained funds from these programs by improperly approving his own application for funds, which project also did not meet the requirements of the programs for other reasons.

b. In 1995, Jerry Williams, a friend of Keith Orr, applied for and obtained $9572 in FSA program funds (ASCS funds) for a Trout Waste Storage Structure on Williams' property despite having deliberately failed to meeting an essential prerequisite that the plans and specifications for the structure be developed and approved prior the application and funding. The NCRS Civil Engineer stated in a December 14, 1996 memo that the structure was planned, installed and paid for "in such a manner as to deliberately circumvent normal NCRS review and approval policy." The application and funding were approved by Graham County and/or Graham County SWCD in September 1995 despite their knowledge of its falsity and impropriety. Thus, Williams, Graham County and Graham County SWCD, filed, assisted in filing, and/or conspired to file, false claims with the FSA for funds to pay for the structure even though they knew that the claims were false and failed to meet essential program prerequisites.

c. Gerald Phillips filed, assisted in the filing, and/or conspired with Graham County SWCD and/or Graham County and their respective defendant supervisors and commissioners to file false claims to have a Waste Storage Structure installed and paid for by the ASCS program between August 1993 and July 1994, which structure and resulting claim failed to meet essential program prerequisites as a result of the deliberate actions of Phillips. Graham County SWCD and Graham County filed, assisted in the filing, and/or

conspired with Gerald Phillips to file false claims for the aforementioned Waste Storage Structure with, and have them paid by ASCS despite knowing that Philips had deliberately circumvented, and failed to meet, the essential program prerequisites. Those failures included the following: Although, to receive funding, Phillips was required first have the project approved by a NRCS engineer and, because Phillips was a Graham County SWCD supervisor at the time, by the Graham County SWCD, no such preapprovals were obtained. A USDA representative concluded in a December 24, 1996 memo that the "structure was hardly recognizable as a waste storage structure . . . [and that Phillips admitted] that the structure was of little use to him in collecting and spreading waste." And in a February 27, 1997 letter, the USDA representative concluded that the project "does not meet NRCS standards." In a 1996 memo, the NRCS Civil Engineer Howard Tew concluded that the structure was planned and installed "in such a manner as to deliberately circumvent normal NRCS review and approval policy."

37. Upon information and belief, the Governmental Defendants took the improper actions described above in order to curry political and personal favor from the individual recipients of the ill-gotten funds and their family, friends and associates and thereby did obtain and enjoy such personal and political gain.

38. Relator Wilson is unable to plead with more specificity and particularly with respect to these false claims because the necessary information is in the control of and/or in the hands of the some of the Defendants.

C. Other False Claims Act Violations

39. In addition to the actions noted above, Defendants committed other acts in violation of the False Claims Act with respect to the above-described programs and/or other programs funded, in whole or in part, by federal funds.

40. These acts included the following:

a. The Governmental Defendants failed to set up the required personnel policies and procedures.

b. Defendants Keith Orr and Graham County SWCD falsified wage and salary reports.

c. The Governmental Defendants approved various budgets for projects funded, in whole or in part, by federal funds, in violation of applicable guidelines and requirements.

d. The Governmental Defendants approved and disbursed funds to pay "ghost" bids., including such payments to Defendant Keith Orr.

e. The Governmental Defendants approved and disbursed funds in the absence of a contract, despite the program requirement that there be an existing contract.

40.1. Upon information and belief, the Governmental Defendants took the improper actions described above in order to curry political and personal favor from the individual recipients of the ill-gotten funds and their family, friends and associates and thereby did obtain and enjoy such personal and political gain.

40.2. Relator Wilson is unable to plead with more specificity and particularity with respect to these false claims because the necessary information is in the control of and/or in the hands of some of the Defendants.

D. Relator Wilson's Investigation And Reporting To Authorities And Defendants' Actions To Conceal Their Wrongdoing.

41. Attempting to keep their wrongdoing concealed, certain defendants' and their agents harassed Relator Wilson after she had began reporting some of the false claims to the authorities. Some instances of the harassment and retaliation are set forth below.

42. On November 16, 1995, when Defendants Richard Greene and Keith Orr became aware that

Relator Wilson might report them, they went to the Graham County Finance Office and tried to get Sharon Crisp, a finance officer, to destroy certain EWP-216 documentation.

43. When that did not work, Defendants Richard Greene and Keith Orr then tried to get Relator Wilson to bill Graham County improperly and fraudulently for another 1,000 feet of seeding in order to cover up discrepancies in the EWP-216 program payments caused by earlier false claims.

44. Because of Relator Wilson's unwillingness to participate in Defendants' fraudulent activities and because she had reported those activities to the NRCS in December of 1995, she was continually harassed by Defendants, including Graham County SWCD Board members, and Richard Greene, Keith Orr and their families with the Board's knowledge, acquiescence and/or approval.

45. As part of its harassment of Relator Wilson, the Graham County SWCD Board repeatedly criticized Wilson's work without cause.

46. On December 5, 1995, a cassette tape of a recorded conversation was left at Relator Wilson's door. On the tape were voices that Relator Wilson identified as those of Richard Greene, Keith Orr and his father, Jimmy Orr, who is currently a Graham County SWCD supervisor.

47. The tape recorded a conversation in which Richard Greene and Keith Orr discussed plans to "get rid" of Relator Wilson by making false allegations against her.

48. On or around December 7, 1995, Keith Orr made threats against Relator Wilson to dissuade her from disclosing the contents of the tape to anyone.

49. On or around December 11, 1995, Relator Wilson sent a letter to Mr. Richard A. Gallo of NCRS detailing accusations of fraud and false claims against the SWCD Board and others.

50. Based on Wilson's letter, the Office of Inspector General ("OIG") of the USDA contacted Relator Wilson in late December 1995.

51. On or around December 21, 1995, OIG Agent Beth Marik interviewed Relator Wilson at her home for three hours regarding Wilson's allegations of wrongdoing, including those concerning the false claims submitted under the EWP-216 and Cost Share Programs. Wilson gave the tape and other evidence she had to Marik.

52. On or around December 19, 1995, Jimmy Orr called Relator Wilson and threatened her regarding the tape.

53. On or around January 2, 1996, in an act of harassment Kim Crisp, a Graham County SWCD finance officer, telephoned Relator Wilson and reprimanded her for errors in a EWP-216 claim submitted by Keith Orr despite the fact that the Graham County SWCD Board had instructed Relator Wilson to process Mr. Orr's prior requests for payment even though they contained similar such errors.

54. In early January 1996, OIG Agent Ken Golec came to Relator Wilson's office and she showed him additional documentation of the various false claims and related improprieties. Agent Golec interviewed her and investigated her allegations.

55. Beginning in January 1996, agents of the State Bureau of Investigation ("SBI") also interviewed Relator Wilson several times concerning her allegations.

56. The investigations by OIG and SBI of Relator Wilson's allegations continued through 1998, and throughout their investigations their agents regularly contacted Relator Wilson, who assisted them in their investigations.

57. On or around January 11, 1996, Relator Wilson discovered a gun barrel on a desk in her office, which, upon information and belief, had been left by one of her co-workers in an attempt to intimidate and scare her.

58. On or around January 16, 1996, Relator Wilson questioned the Graham County SWCD Board about a payment to Keith Orr that was improper because it was for a project that was required to be bid, but was not subjected to the bidding process.

59. On or around March 11, 1996, while Relator Wilson was in the local public library, she overheard Betty Jean Orr, Keith Orr's wife, who was employed by the library, say that she was going to use a six-shooter to shoot Wilson's husband Dennis and that she was going to scratch Relator Wilson's eyes out. Orr stated that it was "all Karen Wilson" and that no one had done anything wrong. Relator Wilson reported the comments to Orr's boss Marsh Clonts and to the USDA OIG.

60. In April 1996, Raymond Williams, Chairman of Graham County, attended an executive session of the Graham County SWCD Board, which Relator Wilson also attended. At that session, Williams threatened to eliminate Wilson's job by closing the SWCD office if she did not stop the federal investigation.

61. The entire Graham County SWCD Board heard Williams' threat but made no response.

62. Subsequent to Richard Greene and William Timpson being relieved of their duties in December of 1995 regarding Graham County, Keith Orr, his wife Betty Jean Orr and Cherie Greene occasionally drove

by the business of Relator Wilson's parents while Relator Wilson was there and when they saw her they would stick up their middle fingers out the window, directing their obscene and hostile gesture to Relator Wilson.

63. From April 8 through April 12, 1996, Donna Moffitt and Diane Brooks from the North Carolina Department of Environment, Health and Natural Resources (DEHNR) conducted a compliance review. As a result of their review, the funds from DEHNR were stopped. Defendant Raymond Williams, a Graham County commissioner, told Relator Wilson to continue paying Keith Orr even after the wrongdoing was discovered and the funds were suspended

64. Defendants continued to make various threats against Relator Wilson through May of 1996, which included telephone calls from Keith Orr's family to Wilson's home and office.

65. Wilson's physician ordered her to take a three-month medical leave of absence from her position at the Graham County SWCD.

66. Complying with her physician's directive, Relator Wilson went on medical leave.

67. Relator Wilson was able to return to work on or about October 1996.

68. However, Defendants resumed their harassment of Relator Wilson once she returned to work. Her co-workers ostracized her and refused even to acknowledge her presence.

69. Unable to tolerate harassment any longer, Relator Wilson was forced to resign on March 3, 1997, effective March 7, 1997.

Count I – False Claims Act Violations

70. Relator Wilson hereby incorporates and re-alleges herein Paragraphs 1-88 as if fully set forth herein.

71. By engaging in the acts set forth above, Defendants, individually, and by and through their agents, officers and employees, in violation of the False Claims Act, 31 U.S.C. §3729-3733, (i) knowingly presented or caused to be presented to an officer or employee of the United States Government numerous false or fraudulent claims for payment or approval, (ii) knowingly made, used or caused to be made or used, false records or statements to get a false or fraudulent claim paid or approved by the Government; (iii) conspired to defraud the Government by getting a false or fraudulent claim allowed or paid; and/or committed other violations listed of the False Claims Act set forth in § 3729(a)(4)-(7).

72. The United States has been damaged as a result of Defendants', violations of the False Claims Act in amounts to be proven at trial.

73. The United States is entitled to treble damages based upon the amount of damage sustained by the United States as a result of Defendants' violations of 31 U.S.C. § 3729.

74. The United States is entitled to a civil penalty of between $5,000.00 and $10,000.00 as required by 31 U.S.C. § 3729(a) for each violation of the False Claims Act by the Defendants.

75. Relator is also entitled to reasonable attorneys' fees and costs pursuant to 31 U.S.C. § 3730(d)(1).

Wherefore, the Relator, on behalf of himself and the United States, requesst that this Court grant the following relief:

(a) That judgment against each named Defendant in an amount equal to three times the amount of damages the United States has sustained because of his or its actions, plus a civil penalty of $5,000 to $10,000 for each violation of 31 U.S.C. § 3729, and the costs of this action, with interest, including the costs of the United States for its expenses related to this action;

(b) That the Relator be awarded all costs incurred, including reasonable attorneys' fees;

(c) That in the event that the United States intervenes in this action, the Relator be awarded 25%, but in no event less than 15%, of the proceeds of the resulting judgment in or settlement of this action;

(d) That in the event that the United States does not intervene in this action, the Relator be awarded 30%, but in no event less than 25%, of the proceeds of the resulting judgment in or settlement of this action;

(e) That the Relator be awarded prejudgment interest; and

(f) That the United States and the Relator receive all relief both at law and at equity, as this Court determines is appropriate.

TRIAL BY JURY IS DEMANDED.

This 31st day of July 2006.

Respectfully submitted,
KAREN T. WILSON

BY /s/ Mark T. Hurt
Mark T. Hurt
(540) 623-0808

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Third Amended Complaint (filed Jul. 31, 2006)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION
CIVIL ACTION
NO. 2:01CV19T
[full caption omitted in printing]

ANSWER OF DEFENDANT KEITH ORR TO THE THIRD AMENDED COMPLAINT

NOW COMES, the Defendant, Keith Orr, answering the Third Amended Complaint of the Plaintiff by alleging and saying that:

FIRST DEFENSE AND MOTION

The Defendant, Keith Orr, moves the Court pursuant to Rule12(b)(6) of the Federal Rules of Civil Procedure for an Order dismissing the Plaintiff's complaint for failure to state a claim upon which relief may be granted.

SECOND DEFENSE

The Defendant, Keith Orr, pleads the applicable statute of limitations stated under 31 U.S.C.S. §3731 in bar to the Plaintiff's Claims for Relief in this action.

THIRD DEFENSE AND MOTION

The Defendant, Keith Orr, moves pursuant Rule 9(b) of the Federal Rules of Civil Procedure for an Order dismissing the complaint of the Plaintiff in this action for failure to plead the claims against the Defendant,

Keith Orr, with sufficient particularity so as to inform him of the dates, circumstances, and events that are the basis for the Plaintiff's Claims for Relief as required by applicable law.

FOURTH DEFENSE

The Defendant, Keith Orr, pleads lack of standing by the Plaintiff, Karen Wilson, in bar to any and all causes of action stated by the Plaintiff. The Plaintiff, Karen Wilson, is not an "original source" as defined and required under 31 U.S.C.S. §3730(e)(4) based on the premise that she has admitted such lack of standing in her verified Answers to Defendant Raymond William's Interrogatories. Such answers indicate and establish that the Plaintiff made allegations in this Third Amended Complaint after relying on information other than her independent and original knowledge. Such other information being that contained in governmental investigations and reports from the Office of Inspector General and the North Carolina State Bureau of Investigation.

FIFTH DEFENSE AND ANSWER

1. The Defendant, Keith Orr, specifically denies paragraphs one, two, three, twenty-six, thirty, thirty-one (a-p), thirty-five, thirty-six (b and c), thirty-seven, thirty-eight, thirty-nine, forty (a-e), 40.1, 40.2, forty-one, forty-two, forty-three, forty-four, forty-five, forty-six, forty-seven,

forty-eight (the Defendant, Keith Orr, told the Plaintiff that he would file suit against her for illegally tape recording a phone conversation of his with another person if she released the contents of the tape), fifty-seven, sixty-two, seventy-one, seventy-two, seventy-three, seventy-four, and seventy-five.

2. The Defendant, Keith Orr, is without sufficient information to form a belief as to the truthfulness of the allegations contained in paragraphs twenty-three, twenty-four, thirty-six (a), forty-nine, fifty, fifty-one, fifty-two, fifty-three, fifty-four, fifty-five, fifty-six, fifty-eight, fifty-nine, sixty, sixty-one, sixty-three, sixty-four (the Defendant, Keith Orr, made no such threats), sixty five, sixty-six, sixty-seven, sixty-eight, and sixty-nine and therefore must deny the same.

3. The Defendant, Keith Orr, admits the allegations stated in paragraphs four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-five, twenty-seven, twenty-eight, twenty-nine, thirty-two, thirty-three, and thirty-four.

4. The Defendant, Keith Orr, realleges and adopts by reference his answers to paragraphs on

through sixty-nine in answer to paragraph seventy.

WHEREFORE, THE DEFENDANT, KEITH ORR, PRAYS THE COURT FOR:

1. A Judgment of this Court dismissing all of the Plaintiff's Claims for Relief in this action and that the Plaintiff have and recover nothing from the Defendant, Keith Orr;

2. A Judgment of this Court ordering the Plaintiff to pay the Defendant, Keith Orr, for all costs incurred by him in this action, including reasonable attorney's fees for the Defendant's counsel;

3. A trial by jury;

4. Any and all further relief that this Court may deem just and proper.

This the 9th day of August, 2006.

McKINNEY AND TALLANT, P.A.
/s/ Zeyland G. McKinney, Jr.
ZEYLAND G. McKINNEY, Jr.
Attorney Bar Number: 11004
Attorney for the Defendant, Keith Orr
[attorney address omitted in printing]
(828) 479-2442

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION
CIVIL ACTION
NO. 2:01CV19T

[full caption omitted in printing]

DEFENDANT CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT'S, EDDIE WOODS', C.B.NEWTON'S AND WILLIAM TIMPSON'S MOTION TO DISMISS, MOTION TO STRIKE, AND ANSWER TO RELATOR'S "THIRD AMENDED COMPLAINT"

DEFENDANTS, Cherokee County SWCD, Bill Tipton, C.B. Newton, and Eddie Wood (Answering Defendants) plead as follows:

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Answering Defendants move to dismiss the Third Amended complaint because it fails to state a claim upon which relief can be granted. The Third Amended Complaint does not meet the pleading standards under the False Claims Act. The Third Amended Complaint fails to state a claim against Answering Defendants because it fails to allege the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby. The basis for the Answering Defendant's Motion is set forth in further detail in the Supporting Memorandum filed herewith.

* * * * *

[motion to strike omitted in printing]

Now therefore, the Answering Defendants set forth the following affirmative defenses.

**AFFIRMATIVE DEFENSE-
FAILURE TO STATE A CLAIM**

The Third Amended Complaint fails to state a claim upon which relief can be granted.

**AFFIRMATIVE DEFENSE-
LAW OF THE CASE**

The Third Amended Complaint is contrary to the law of the case. It alleges that defendants Wood, Tipton and Newton are being sued in their "personal capacities" contrary to prior Orders of this Court which have become the law of the case.

**AFFIRMATIVE DEFENSE-EXCEEDS SCOPE
OF ORDER ALLOWING AMENDMENT**

The Third Amended Complaint exceeds the scope of this Court's Order dated July 14, 2006 granting relief under Rule 60 from the Order of July 11, 2006. To the extent the Third Amended Complaint exceeds the scope of those Orders and Relator's Motion to

Reconsider, it violates Rule 15 of the Rules of Civil Procedure.

**AFFIRMATIVE DEFENSE-
VIOLATES THE RULES OF CIVIL
PROCEDURE**

The Third Amended Complaint violates Rule 9 of the Rules of Civil Procedure. The Third Amended Complaint violates Rule 9 because it fails to detail with particularity the facts alleged to support a claim of fraud against Answering Defendants under the False Claims Act. Under the False Claims Act, the Relator is required to allege the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby. Relator's Third Amended Complaint fails to do so against the Answering Defendants.

AFFIRMATIVE DEFENSE - ESTOPPEL

Relator Karen Wilson is estopped from bringing this action on behalf of the United States and is estopped from seeking damages from these defendants due to her own conduct and position. The United States is estopped from seeking damages from these defendants because Answering Defendants acted in good faith

reliance upon representations made by employees of the United States.

AFFIRMATIVE DEFENSE - NO PRESENTMENT OF FALSE CLAIM

Answering Defendants did not knowingly present any false claims to the United States.

AFFIRMATIVE DEFENSE - NO KNOWLEDGE OF FALSITY

Answering Defendants acted in good faith reliance upon the truthfulness of statements by others.

AFFIRMATIVE DEFENSE - DEFENDANTS NOT PERSONS

Answering Defendants are not persons liable under the Act.

AFFIRMATIVE DEFENSE - CRIMINAL CONDUCT

The United States cannot recover damages from these defendants for criminal conduct or acts by U.S. Department of Agriculture employees or others.

AFFIRMATIVE DEFENSE - RELATOR NOT ORIGINAL SOURCE

The Third Amended Complaint is not verified by Relator and all allegations of fraud under the False Claims Act against Answering Defendants in the Third Amended Complaint are alleged upon information and belief. Additionally, as argued above, the allegations are vague and conclusory indicating a lack of knowledge on the part of Relator.

AFFIRMATIVE DEFENSE - STATUTE OF LIMITATIONS AND LACHES

Answering Defendants plead the applicable statute of limitations stated under 31 U.S.C.A. §3731 in bar to the Plaintiff's Claims for Relief in this action. To the extent that matters alleged were brought within the applicable limitations period, the doctrine of laches precludes recovery as the delays in bringing this action have prejudiced Answering Defendants.

NOW THEREFORE, the Answering Defendants, without waiving the Defenses and Motions raised above, respond to the allegations of the Third Amended Complaint as follows, following the same numbering scheme

1. Admitted that this is a qui tam action. Otherwise denied.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted.

18. Admitted.

19. Admitted.

21. Admitted.

22. Admitted.

23. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

24. Denied.

25. No response required to this paragraph.

Factual Allegations

26. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

A. False Claims Under The Federal Emergency Watershed Protection Program

27. Admitted.

28. Admitted.

29. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

30. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

31. Subject to the Affirmative Defenses raised above, the answering defendants respond to the allegations of the subparagraphs in sequence:

a. Answering Defendants are without information sufficient to respond to the allegations of this paragraph and they are therefore denied.

b. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

c. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

d. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

e. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

f. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

g. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

h. Sub-paragraph not used.

i. Subject to Affirmative Defenses raised above, Answering Defendants admit that Richard Green and William Timpson approved all payments under EWP 216. Answering Defendants are without information sufficient to respond to the vague allegations of second sentence in this paragraph and they are therefore denied.

j. Answering Defendants are without information sufficient to respond to the allegations of this paragraph and they are therefore denied.

k. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

l. Denied.

m. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

n. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

o. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

p. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

B. False Claims Under Farm Services Agency Programs

32. Answering Defendants are without information sufficient to respond to the allegations of this paragraph and they are therefore denied.

33. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

34. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

35. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

36. Subject to the affirmative defenses raised above, Answering Defendants respond to the subparagraphs in this section as follows:

a. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

b. Answering Defendants are without information sufficient to respond to the allegations of this paragraph and they are therefore denied.

c. Answering Defendants are without information sufficient to respond to the allegations of this paragraph and they are therefore denied.

37. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

38. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

C. Other False Claims Act Violations

39. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

40. No response required.

a. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

b. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

c. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

d. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

e. Answering Defendants are without information sufficient to respond to the vague allegations of this paragraph and they are therefore denied.

40.1 Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

40.2 Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

D. Relator Wilson's Investigation And Reporting To Authorities And Defendants' Actions To Conceal Their Wrongdoing.

41. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

42. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

43. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

44. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

45. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

46. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

47. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

48. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

49. Admitted.

50. Admitted.

51. Admitted.

52. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

53. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

54. Admitted.

55. Admitted.

56. Admitted.

57. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

58. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

59. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

60. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

61. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

62. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

63. First two sentences Admitted. As to last sentence, Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

64. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

65. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

66. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

67. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

68. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

Count - - False Claims Act Violations

70. No Response Required.

71. Answering Defendants are without information sufficient to respond to the vague allegations and they are therefore denied.

72. Answering Defendants are without information sufficient to respond to the vague allegations and they are therefore denied.

73. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

74. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

75. Answering Defendants are without information sufficient to respond to the allegations and they are therefore denied.

WHEREFORE, the Answering Defendants pray the Court that

1. The Motion to Strike be allowed;

2. The Motion to Dismiss be allowed;

3. Relator's claims be dismissed with prejudice;

4. Relator be taxed with Answering Defendant's costs and attorney's fees as permitted by law; and

5. Grant the Answering Defendants such other and further relief as the Court may deem just and proper,

This the 14th day of August, 2006.

ROY COOPER
Attorney General
/s/James P. Longest, Jr.
rlongest@ncdoj.com
[attorney address omitted in printing]
Tel 919/716-6600
State Bar No. 18297

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION
NO. 2:01-CV-19T

[full caption omitted in printing]

MOTION TO STRIKE AND ANSWER OF DEFENDANTS GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, GERALD PHILLIPS, ALLEN DEHART, AND LLOYD MILLSAPS TO PLAINTIFF'S THIRD AMENDED COMPLAINT

NOW COME defendants Graham County Soil & Water Conservation District, Gerald Phillips, Allen Dehart and Lloyd Millsaps, and respond to the Plaintiff's Third Amended Complaint as follows:

INTRODUCTION

1. On June 13, 2006, this Court issued an Order clarifying which parties and which claims remained in the litigation. The June 13 Order cited the fact that this Court had dismissed all claims against these answering defendants (Graham County Soil and Water Conservation District, Lloyd Millsaps, Alan Dehart, and Gerald Phillips under Sections C and D of the Second Amended Complaint by Order of September 20, 2002. The June 13 Order also provided that defendant Lloyd Millsaps remained in the action in his official capacity only.

2. Within the Order of June 13, 2006, the Court Ordered Relator to Proceed as follows: "On or before fifteen days from entry of this Order, the Plaintiff shall do one of the following: (1) notify the Court by written filing that it dismisses the action against Defendants Millsaps, Tipton, Newton and/or Wood; or (2) file a motion for leave to file an amended complaint which shall contain specific allegations as to one or more of these defendants and attach a copy of the proposed amended complaint." Relator did neither.

3. On July 11, 2006, this Court, *sua sponte* issued an Order dismissing certain defendants and claims, including Lloyd Millsaps, and ordering that the action proceed against Alan Dehart and Gerald Phillips in their official capacities only. On July 11, 2006, shortly after this Order was filed, the Relator filed a Response to this Court's Order of June 13, 2006. The Relator's Response asserted that no amendment was necessary because the original Second Amended Complaint was sufficient. On July 13, 2006, the Relator filed a Motion to Reconsider the Order of July 11, 2006 upon the basis that counsel's health issues contributed to Relator's failure to timely Respond.

4. On July 14, 2006, the Court issued a new Order in response to Relator's Motion to Reconsider. This Order allowed Relator to file an amended complaint to correct deficiencies noted in the Order. Among those deficiencies was the allegation against Gerald Phillips

in paragraph 36(c) of the Second Amended Complaint which the Court characterized as "confusing." The Court then said it would review the Complaint to see whether the amendment cured the deficiencies cited.

5. On July 31, 2006 filed a document captioned "Third Amended Complaint."

WHEREFORE, these answering defendants, having not yet been informed of this Court's ruling regarding the adequacy of the Third Amended Complaint, out of an abundance of caution, and before the time permitted by law to answer expires, respond to the Third Amended Complaint (as filed) as follows:

* * * * *

[motion to strike omitted in printing]

These answering defendants assert the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE
Failure to State a Claim

The Third Amended Complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

SECOND AFFIRMATIVE DEFENSE
Statute of Limitations

The claims alleged in plaintiff's Complaint and Second and Third Amended Complaints are barred by the applicable Statute of Limitations set forth in 31 U.S.C.S. § 3731.

THIRD AFFIRMATIVE DEFENSE
Violation of the Federal Rules of Civil Procedure

Plaintiff has failed to file a Motion for Leave to Amend contemporaneously with the filing of the her Third Amended Complaint as required by Rule 15 of the Rules of Civil Procedure and this Court's Order of June 13, 2006.

Further, plaintiff has failed to plead claims against these answering defendants with sufficient particularity so as to inform them of the dates, circumstances, and events that are the basis for Plaintiff's claims for relief as required by Rule 9(b) of the Rules of Civil Procedure.

FOURTH AFFIRMATIVE DEFENSE
Estoppel

Plaintiff Karen Wilson upon information and belief participated in and/or acquiesced in the claims alleged in the Complaint and the Second and Third Amended

Complaints and is estopped from bringing this action on behalf of the United States and is estopped from seeking damages from these defendants.

Further, these defendants relied at all material times in good faith on the guidance of and representations made by United States' employees and the United States is estopped from seeking damages from these defendants.

FIFTH AFFIRMATIVE DEFENSE
Laches

Plaintiff upon information and belief has unfairly delayed bringing this action and these defendants have been prejudiced by this delay.

SIXTH AFFIRMATIVE DEFENSE
Criminal Conduct

The United States cannot recover damages from these defendants for criminal conduct or acts by U.S. Department of Agriculture employees.

SEVENTH AFFIRMATIVE DEFENSE
Law of the Case

The Third Amended Complaint is contrary to the law of the case with respect to these answering defendants

EIGHTH AFFIRMATIVE DEFENSE
Exceeds Scope of Order Allowing Amendment

The Third Amended Complaint exceeds the scope of this Court's Order of July 14, 2006.

NINTH AFFIRMATIVE DEFENSE
No Presentment of False Claim

These answering defendants did not knowingly present any false claims to the United States.

ANSWER

Without waiving the foregoing Motion to Strike or any of the other defenses asserted herein, these answering defendants answer the numbered allegations of plaintiff's Third Amended Complaint as follows:

1. These defendants admit this is an action by *qui tam* Relator Karen Wilson, in the name of the United States, to recover penalties and damages allegedly arising from false claims for money submitted to the United States. These defendants are without sufficient information to admit or deny the remaining allegations of Paragraph 1 and same are therefore denied.

2. Admitted.

3. These defendants admit that venue is proper in the United States District Court for the Western District of North Carolina because at least one answering defendant resides within the District. The remaining allegations of Paragraph 3 are denied.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Plaintiff makes no allegations in this paragraph.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted.

18. Admitted.

19. Admitted.

20. Admitted.

21. Admitted.

22. Admitted.

23. Denied.

24. These defendants are without sufficient information to admit or deny the allegations of Paragraph 24 and same are therefore denied.

25. Plaintiff makes no factual allegations to be admitted or denied in this paragraph.

26. Denied.

A. Allegedly False Claims Under The Federal Emergency Watershed Protection Program.

27. Admitted.

28. Admitted.

29. These defendants admit that Keith Orr was appointed to perform job site/equipment inspections on the EWP-216 project. Except as answered, the allegations of Paragraph 29 are denied.

30. Denied.

31. These defendants respond to the allegations of Subparagraphs 31 as follows:

(a). Denied.

(b). Denied.

(c). Denied.

(d). Denied.

(e). Denied.

(f). These defendants are without sufficient information to admit or deny the allegations of Subparagraph 31(f) and same are therefore denied.

(g). These defendants are without sufficient information to admit or deny the allegations of Subparagraph 31(g) and same are therefore denied.

(h). Subparagraph 31(h) makes no allegation.

(i). These defendants are without sufficient information to admit or deny the allegations of Subparagraph 31(i) and same are therefore denied.

(j). These defendants are without sufficient information to admit or deny the allegations of Subparagraph 31(j) and same are therefore denied.

(k). These defendants are without sufficient information to admit or deny the allegations of Subparagraph 31(k) and same are therefore denied.

(l). These defendants are without sufficient information to admit or deny the allegations of Subparagraph 31(l) and same are therefore denied.

(m).These defendants are without sufficient information to admit or deny the allegations of Subparagraph 31(m) and same are therefore denied.

(n). These defendants are without sufficient information to admit or deny the allegations of Subparagraph 31(n) and same are therefore denied.

(o). Denied.

(p). Denied.

B. Allegedly False Claims Under Farm Services Agency Programs

32. Admitted.

33. These defendants deny upon information and belief that actions alleged in Section B of plaintiff's Third Amended Complaint involve FSA programs or that the programs involved were funded by federal funds. These defendants are without sufficient information to admit or deny any allegations of Paragraph 33 and same are therefore denied.

34. These defendants are without sufficient information to admit or deny the allegations of Paragraph 34 and same are therefore denied.

35. Denied.

36. These defendant respond to the allegations of Subparagraphs 36 as follows:

(a). These defendants are without sufficient information to admit or deny the allegations of Subparagraph 36(a) and same are therefore denied.

(b). Denied.

(c). Denied.

37. Denied.

38. Denied.

C. Other Alleged False Claims Act Violations

39. Denied.

40. These defendants respond to the allegations of Subparagraphs 40 as follows:

(a). Denied.

(b). Denied.

(c). Denied.

(d). Denied.

(e). Denied.

40.1.Denied

40.2.Denied

D. Defendants' Alleged Actions to Conceal Their Wrongdoing

41. Denied.

42. These defendants are without sufficient information to admit or deny the allegations of Paragraph 42 and same are therefore denied.

43. These defendants are without sufficient information to admit or deny the allegations of Paragraph 43 and same are therefore denied.

44. Denied.

45. Denied.

46. These defendants are without sufficient information to admit or deny the allegations of Paragraph 46 and same are therefore denied.

47. These defendants are without sufficient information to admit or deny the allegations of Paragraph 47 and same are therefore denied.

48. These defendants are without sufficient information to admit or deny the allegations of Paragraph 48 and same are therefore denied.

49. These defendants are without sufficient information to admit or deny the allegations of Paragraph 49 and same are therefore denied.

50. These defendants are without sufficient information to admit or deny the allegations of Paragraph 50 and same are therefore denied.

51. These defendants are without sufficient information to admit or deny the allegations of Paragraph 51 and same are therefore denied.

52. These defendants are without sufficient information to admit or deny the allegations of Paragraph 52 and same are therefore denied.

53. These defendants are without sufficient information to admit or deny the allegations of Paragraph 53 and same are therefore denied.

54. These defendants are without sufficient information to admit or deny the allegations of Paragraph 54 and same are therefore denied.

55. These defendants are without sufficient information to admit or deny the allegations of Paragraph 55 and same are therefore denied.

56. These defendants are without sufficient information to admit or deny the allegations of Paragraph 56 and same are therefore denied.

57. These defendants are without sufficient information to admit or deny the allegations of Paragraph 57 and same are therefore denied.

58. Denied.

59. These defendants are without sufficient information to admit or deny the allegations of Paragraph 59 and same are therefore denied.

60. Denied.

61. Denied.

62. These defendants are without sufficient information to admit or deny the allegations of Paragraph 62 and same are therefore denied.

63. These defendants admit that from 8 April 1996 to 12 April 1996, Donna Moffitt and Diane Brooks from the N.C. Department of Environment, Health and Natural Resources conducted a compliance review. The remaining allegations of Paragraph 63 are denied.

64. Denied.

65. These defendants admit that plaintiff's physician recommended that she not continue working in her position. Except as answered, the allegations of Paragraph 65 are denied.

66. These defendants admit that plaintiff went on medical leave. Except as answered, the allegations of Paragraph 66 are denied.

67. Admitted.

68. Denied.

69. Denied.

COUNT I

70. These defendants incorporate by reference their response to Paragraphs 1 through 69.

71. Denied.

72. Denied.

73. Denied.

74. Denied.

75. Denied.

WHEREFORE, these defendants pray the Court that

1. The Motion to Strike be allowed;

2. Plaintiff's claims be dismissed with prejudice;

3. Plaintiff be taxed with costs and attorney's fees as permitted by law; and

4. For such other relief as the Court deems proper.

This the 14th day of August, 2006.

ROY COOPER
Attorney General

s/Sueanna P. Sumpter
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s/T. Lane Mallonee
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United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Graham County SWCD, Gerald Phillips, Allen Dehart and Lloyd Millsaps' Answer to Third Amended Complaint (filed Aug. 14, 2006)

s/Martin T. McCracken
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[attorney addresses omitted in printing]

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NORTH CAROLINA BRYSON CITY DIVISION
CASE NO. 2:01CV19T

[full caption omitted in printing]

ANSWER OF DEFENDANTS GRAHAM COUNTY, RAYMOND WILLIAMS, DALE WIGGINS, AND LYNN CODY TO THIRD AMENDED COMPLAINT; DEMAND FOR JURY TRIAL

COME NOW Defendants Graham County, Raymond Williams, Dale Wiggins and Lynn Cody, and answering Plaintiff's Third Amended Complaint for themselves alone and for no other Defendants, admit, deny and allege as follows:

1. Defendants admit the allegations of paragraphs 2, 5, 6 and 28.

2. Answering the allegations contained in paragraph 3, Defendants admit only that venue is proper in this Court based upon the residency of one or more of the Defendants.

3. Answering the allegations contained in paragraphs 17-19, Defendants admit their citizenship and residency, and clarify that Williams was a Commissioner from 1986 to 1998 while Cody and Wiggins were Commissioners from 1994 to 1998.

4. Answering the allegations contained in paragraph 31(c), Defendants admit the issuance of the July 12, 1996 check and the notarized statement by Sharon Crisp. Except as so admitted, Defendants deny each and every allegation contained in said paragraph and the whole thereof.

5. Answering the allegation contained in paragraph 36(b), Defendants admit only the existence of the NRCS' civil engineer's December 14, 1996, memo. Except as so admitted, Defendants deny each and every allegation contained in said paragraph and the whole thereof.

6. Answering the allegations contained in paragraph 36(c), the Defendants admit only the existence of the USDA representative's December 24, 1996 memo, February 27, 1997 letter, and Howard Tew's 1996 memo. Except as so admitted, Defendants deny each and every allegation contained in said paragraph and the whole thereof.

7. Answering the allegations contained in paragraphs 4, 7-9, 11-16, 20-22, 24-25, 27, 29, 31(a)-(b), (d)-(g), (i)-(n), (p), 32-34, 36(a), and 38, Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations in these paragraphs.

8. Answering the allegations contained in paragraphs 1, 23, 26, 30, 31 (o), 35, 37, and 71-75, Defendants deny each and every allegation contained therein and the whole thereof.

9. Pursuant to Judge Thornburg's August 14, 2006 Order striking sections C and D of the Third Amended Complaint, no answer is required for allegations 39-69 in the Third Amended Complaint.

FIRST AFFIRMATIVE DEFENSE

10. The Plaintiff's third amended Complaint violates Judge Thornburg's June 13, 2006, Order which stated that "[t]he claims which remain in the action are the claims based on the False Claims Act as alleged in Sections A and B of the Second Amended Complaint concerning the Federal Emergency Watershed Protection Program and the Farm Services Program." This Order further stated that the Plaintiff may file an amended complaint containing specific allegations as to defendants Millsaps, Tipton, Newton, and/or Wood. The Third Amended Complaint, however, adds a conspiracy allegation against these answering defendants in paragraph 36(c) which exceeds the scope of this Court's June 13, 2006, Order.

SECOND AFFIRMATIVE DEFENSE

11. Defendants at all times acted in good faith.

THIRD AFFIRMATIVE DEFENSE

12. Plaintiff is barred from recovery herein by the doctrine of sovereign immunity.

FOURTH AFFIRMATIVE DEFENSE

13. Plaintiff is barred and estopped from recovery herein under the doctrine of estoppel.

FIFTH AFFIRMATIVE DEFENSE

14. Plaintiff is barred from recovery herein for her failure to mitigate damages.

SIXTH AFFIRMATIVE DEFENSE

15. Plaintiff is barred from recovery herein by virtue of her own wrongful conduct.

SEVENTH AFFIRMATIVE DEFENSE

16. Plaintiff is barred from recovery herein for lack of standing.

EIGHTH AFFIRMATIVE DEFENSE

17. The Third Amended Complaint fails to state a claim upon which relief can be granted.

NINTH AFFIRMATIVE DEFENSE

18. The Third Amended Complaint is barred by the statute of limitations.

WHEREFORE, Defendants pray that Plaintiff take nothing by way of the Third Amended Complaint, that Defendants recover their costs of suit, that Defendants receive trial by jury, and for such other relief that the Court may deem just and proper.

Dated: August 14, 2006

S/Sean F. Perrin
N. C. Bar Number 22253
Attorney for *Defendants* Graham County, Dale Wiggins, Raymond Williams, Lynn Cody
Womble Carlyle Sandridge & Rice
Phone: (704) 331-4992
[attorney address omitted in printing]
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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION
NO. 2:01-CV-19T

[full caption omitted in printing]

DEPOSITION OF KAREN T. WILSON
Thursday, August 17, 2006

[Reporter and Attorney Information and Table of Contents Omitted]

[18]

* * * * *

Q That's not my question. My question was, what did Mr. Wood do wrong?

A As a supervisor he did not fulfill his responsibilities.

[19]

Q You did not see him take any action that you thought was improper?

A I was not employed with the Cherokee County Soil and Water Conservation District and was not at the meetings where they were taking the action on the EWP 216 project.

* * * * *

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Attachment to Cherokee CSWCD Motion for Summary Judgment (filed Dec. 1, 2006) - Statement of Karen Wilson dated November 14, 1996

Robbinsville, North Carolina

I, Karen Wilson, being duly sworn to oath make the following statement freely and voluntarily to A. Kenneth Golec, who has identified himself to me as a Special Agent of the Office of Inspector General - Investigations, United States Department of Agriculture, knowing that this statement may be used in evidence.

I have been employed as the District Secretary for the Graham County, North Carolina, Soil and Water Conservation District (SWCD) since January of 1993. I am responsible for general office duties such as paying bills, depositing funds, filing payroll and taxes for SWCD employees and typing and filing SWCD paperwork on various projects. I have been responsible for coordinating the education program for the SWCD.

From January 1993 to June 1996 I was supervised by the chairman of the Graham County SWCD Board, Bruce Lewis. During the period of January 1993 through December 1995, Bruce Lewis and the SWCD Board agreed that U.S. Department of Agriculture (USDA) District Conservationist, Richard Greene would handle the day to day supervision of the SWCD office and I would fall under his supervision. Richard Greene was the USDA Natural Resources Conservation Service (NRCS) District Conservationist

responsible for the North Carolina counties of Graham, Cherokee and Clay counties.

The SWCD has had two employees during the time I worked there. I and SWCD Soil Technician, Keith Orr, were the two employees. There were two USDA Natural Resources Conservation Service (NRCS) employees who were also responsible for Graham County and worked together with our office. The two USDA employees were Richard Greene and William (Bill) Timpson. Bill Timpson was the USDA Soil Conservation Technician assigned full time to Graham County. During the period I was there Timpson was sent on USDA Emergency Watershed Program (EWP) work details in Perry, Georgia and the Midwest in 1993 and 1994.

When I first started my job, I noticed checks made out by Graham County residents to a company called Fantasia. These checks would be left at the SWCD office. I was told by the people making out the checks that these were for Richard Greene. I was, also, told by the people bringing them in that they were for the purchase of filter fabric cloth.

I was told by Bill Timpson and Keith Orr that the filter fabric that was purchased from Fantasia was kept at Richard Greene's house. Bill Timpson and Keith Orr would call in or tell me at the office if they had to get filter fabric or cut filter fabric at Richard

Greene's house to take to farmers to use in their conservation plans. The filter fabric was used in conservation plans under the North Carolina Agriculture Cost Share Program (NCACSP).

I believe Bill Timpson and Keith Orr were receiving checks from Richard Greene based on the amount of filter fabric cloth that was sold. Shortly after I started work at the SWCD, I was in the office and heard Bill Timpson and Keith Orr arguing with Richard Greene over the dividing of the profits from the sale of the filter fabric cloth. Timpson and Orr argued with Greene about not getting their correct share of the profits from the sale of the fabric. I do not know how Timpson and Orr were paid for the sale of the filter fabric cloth. It was my understanding from talking to employees at the Cherokee County and Clay County SWCD offices, that these SWCD employees received payments from Richard Greene for the sale of the filter fabric. I did not receive money or anything from the sale of the filter fabric.

I became aware of a controversy in Cherokee County involving Richard Greene and Cherokee SWCD employees Perry Ware and Kendra Lovingood. The two SWCD employees at a Cherokee SWCD meeting brought up the issue of Richard Greene selling filter fabric. This Cherokee SWCD meeting occurred approximately 1 ½ years ago and I am not aware of

Richard Greene selling any filter fabric since that time.

I am aware from filing records at the SWCD that Cherie Greene, the spouse of Richard Greene, received North Carolina Agriculture Cost Share Program (NCACSP) funds during the time period 1989 through 1993. In 1993, 1994, and 1995 NCACSP funds were allocated for G&L Farms. I believe G&L stands for Greene and Lane. In 1993 Richard Greene was in the office with Joyce Lane filling out the application for G&L Farms and Richard Greene stated to me that G&L stood for Greene & Lane. I believe Greene and Lane represented a partnership between Richard and Cherie Greene and Charles and Joyce Lane of Robbinsville, North Carolina. Richard Greene talked about G&L Farms in terms as that he was part of it. He would receive phone calls at the office saying his cattle had gotten out. These phone calls would be for the G&L Farms cattle kept on the Lower Mountain Creek property in Graham County.

In 1993 a NCACSP check was issued out to G&L Farms in the name of Joyce Lane in the amount of $2,959. In 1994 NCACSP checks were issued out to G&L Farms in the name of Joyce Lane in the amount of $5,152. In 1995 a NCACSP plan for $2,265 was submitted to NCACSP in Raleigh, North Carolina. A request for payment has never been made on this plan.

I believe Joyce Lane's name was forged on some of the plans for G&L Farms and on checks made out to G&L Farms in 1994. Joyce Lane divorced Charles Lane over two years ago and moved out of North Carolina. I do not believe she was aware that her name continued to be used on NCACSP plans. Joyce Lane was in the SWCD office with Richard Greene when the first G&L Farms plan was filled out in 1993. I believe the first NCACSP plan would have her signature on it.

I was on federal jury duty in May of 1995 and was out of the SWCD office. When I returned to work in May of 1995, I became aware that not all of the NCACSP funds allocated to Graham County had been used. The unused funds would have to be returned to the state at the end of June. I spoke over the phone to Karen Bates, Administrative Secretary of the Cherokee County SWCD and expressed my concern that the NCACSP money would have to be returned. Karen Bates told me that she had spoke to Richard Green and Greene was supposed to have taken care of making sure all of the Graham County NCACSP funds were allocated that day. I checked the SWCD file records and found a 1995 NCACSP plan for G&L Farms, which had been prepared and mailed to the NCACSP state office. I did not type or prepare this plan. I did not have any knowledge that Richard Greene was going to do this. The 1995 G&L Farms plan had Bruce Lewis' name signed on it as the approving official. I contacted Bruce Lewis by phone

that same afternoon about this plan and be denied signing it. This plan was not presented at any SWCD meeting and I am not aware of any Graham County SWCD board member having knowledge of it.

Bruce Lewis contacted me, approximately one or two days, after I told him about the 1995 G&L Farms plan. Bruce Lewis told me he asked Greene about the plan and Greene told Lewis that he had prepared this plan for G&L Farms in order to prevent the Graham County SWCD from having to return any NCACSP funds to the state. Lewis told me that Greene told him that he was not intending to collect the money. I informed Bruce Lewis that other plans had been submitted for G&L in the past and money had been collected. Greene did not tell me and has never told me that the plan was prepared to save NCACSP funds for the county. Lewis told me shortly after this conversation that he had spoken to Richard Greene several other times and he discussed the G&L Farms issue and other problems regarding the way Richard Greene was handling things. Lewis told me that he told Greene to do what was right and to handle the matters properly. I know between May and December of 1995 that myself and Bruce Lewis decided that Richard Greene had not taken any action on the problems Bruce Lewis had discussed with him. We first notified NRCS of our problems when Howard Tew the NRCS Area I Engineer came to Robbinsville in approximately 10/95. We spoke to him more then one

time and ended up sending our concerns in a letter to the NRCS State Office in Raleigh in 12/95.

The G&L Farms plans were not presented to the SWCD supervisors or approved in the SWCD Board minutes, during the time I have been a SWCD employee. The G&L Farms NCACSP plans lacked the landowner's signature as neither the Greenes' or the Lanes' owned the land listed on the plans. I remember Richard Greene picked up one of the NCACSP checks for G&L Farms at the office. I noted this because approximately 99% of the time Keith Orr would pick up the NCACSP check and take it out to the farmer. I remember giving Richard Greene this check, because it was unusual for him to take a check out.

On December 7, 1995 I wrote a letter to NRCS State Office in Raleigh outlining a number of complaints about Richard Greene's handling of EWP, NCACSP and other issues in Graham County. On December 12, I was notified by the Area 1 Conservationist for USDA-NRCS that Richard Greene was deferred by USDA out of the Graham County office. On December 14, 1995 I noticed that all of the files pertaining to G&L Farms were missing from the office. Keith Orr also looked for the files in the office and could not find them. Keith Orr told me that Richard Greene had told him that he (Greene) was going to look at them to make sure there was nothing wrong with them. Keith Orr called Richard Greene's house and spoke to Cherie Greene

and was told that the files were there. I notified the NRCS State Office in Raleigh by phone on December 15, 1995 about the missing files. On Saturday, December 16, 1995 I stopped by the SWCD office and found all but the 1995 G&L Farms plan had been returned. On December 18, 1995 Keith Orr told me that he returned the 1993 and 1994 G&L Farms files to the SWCD office after going to pick them up from Richard Greene's house. The 1995 G&L Farms plan has never been returned. I had kept an extra copy of this file and this is the copy that is now in the office. I could not tell if anything was missing from any of the files.

There was a second incident in which Richard Greene returned to Graham County after he was deferred on December 12, 1995. I was contacted by Sharon Crisp, Chief Financial Officer of Graham County, shortly after Richard Greene was deferred. Greene went to the Graham County office building to request to look at EWP records. Greene met with Sharon Crisp and County Manager, Dale Wiggins. Crisp can provide further information.

Graham County suffered damage during a flood in February, 1995. The county received federal funds through the USDA Emergency Watershed Program for repairs. The county provided a 25% in-kind agreement of the funding to the Graham County SWCD in the form of a Performance of Work Agreement. The SWCD

agreed to be responsible for handling the cribbing (structures built to stabilize the creek bank and prevent further flooding), seeding (replacement of vegetation in the creek bank) and rock rip rap (rock placed to stabilize the creek bank). The county and the SWCD were reimbursed after the completion of the work.

On March 28, 1995 a Performance of Work Agreement was approved by the SWCD Board. This agreement outlined the repairs to be done in conjunction with the EWP. The SWCD Board appointed me to perform the inspections of the seeding work and Keith Orr, NCACSP Soil Technician, was appointed Inspector of the other projects. Richard Greene was the government representative for the project. Richard Greene never explained to the SWCD Board how contracts for the work were to be bid upon and/or contracted for the seeding, cribbing or rock rip rap work. There were not any bids made on these projects and there were not any contracts ever made through the Graham County SWCD office.

On June 19, 1995 I received an invoice from Keith Orr for seeding work that was done by him. After receiving the invoice I told Richard Greene that I could not pay Orr because it was a conflict of interest by him, because he was a SWCD employee. The Graham County Board of Commissioners had issued a code of conduct that addressed this type of issue regarding a

conflict of interest. Richard Greene told me that if I did not pay the invoice, Keith Orr would sue the SWCD for withholding contract funds. I told Richard Greene that Keith Orr did not have a contract. On June 20, 1995 Richard Greene presented the Keith Orr seeding invoice to the SWCD supervisors. Greene told the SWCD Board that Orr had to be paid because he had done the work and had submitted an invoice listing the sites and square footage which he seeded. Greene told the SWCD Board that their contract was with Orr for $27 a foot. I informed the SWCD Board that there was not a contract with Orr in the office and I asked the SWCD Board if they needed to get a contract. Greene stated that the invoice was all they needed in order to pay Orr. I issued a check to Keith Orr on June 22, 1995 for $5,130 for the seeding. Keith Orr did not have a contractor's license or liability or worker's compensation insurance for the jobs he completed.

A written contract for Keith Orr doing the seeding work first showed up at the county manager's office, Dale Wiggins, shortly before a Graham County SWCD meeting on 12/17/95. I was told that Keith Orr brought this contract to Dale Wiggins shortly before the 12/17/95 meeting. This contract had not previously been at the Graham County SWCD office. I had never seen this contract before.

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Attachment to Cherokee CSWCD Motion for Summary Judgment (filed Dec. 1, 2006) - Statement of Karen Wilson dated November 14, 1996

On October 4, 1995 I received an invoice from Keith Orr for a 105,000 square feet of seeding. Richard Greene had the SWCD bill the county for 107,000 square feet of seeding. I told Richard Greene that the bills did not correspond. On November 16, 1995 Richard Greene and Keith Orr went to the County Manager's office while he was gone, obtained the EWP files involving the 107,000 square feet of seeding and attempted to have the Chief Financial Officer of Graham County, Sharon Crisp, tear up the billing paperwork. Crisp would not do it and after they left the office, Crisp called me and told me about their request. Crisp also told me at this time that Orr and Greene were on their way back to the SWCD office and they were going to ask me to change my figures. Crisp instructed me not to change any figures for Greene and Orr. Crisp told me that Dale Wiggins was not in his office and they had not spoken to him. When Greene and Orr arrived at the SWCD office, Orr told me that they had been in a meeting with Dale Wiggins and that Wiggins had made an error in math on the county's billing. Orr asked me to bill the county for an additional 1000 square feet. I do not know why they did not ask for 2000 square feet to correct the miscalculation. I did not prepare the additional billing. I spoke to Wiggins later on and confirmed that he was not in his office that day and did not have a meeting with Greene and Orr.

Richard Greene would help Keith Orr in preparing the invoices for seeding. They would work together in Richard Greene's office preparing the invoices. The invoice turned in by Keith Orr for seeding dated June 19, 1995 is in Richard Green's handwriting. There was not any system set up by the SWCD as to what had to be on the invoice.

Richard Greene attempted to have Keith Orr do the seeding work in Clay County for the EWP program without having to put in a bid or having a contract. The Clay County SWCD would not permit this and required bids for the work. Keith Orr did not end up bidding on the seeding work in Clay County. I found out this information from talking with Clay County SWCD employees.

Orr submitted additional invoices for seeding and cribbing work after June 19, 1995. Orr performed the seeding and cribbing work while on official duty as a NCACSP soil technician.

I did not inspect any of the seeding projects under the EWP work, despite being named the inspector by the Graham County SWCD Board. I was not asked to inspect any of the seeding projects when they were finished and I was never told when any of the seeding projects were completed. Richard Greene approved each payment for the seeding.

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Attachment to Cherokee CSWCD Motion for Summary Judgment (filed Dec. 1, 2006) - Statement of Karen Wilson dated November 14, 1996

On August 31, 1995, Keith Orr submitted invoices for seeding and cribbing work to me. Orr told me he was upset because Richard Greene was not splitting up the monies properly. Orr explained to me that he, Green and Bill Timpson had decided when the EWP program began they would perform the cribbing and seeding work in G aham and Cherokee counties and split the profits. Orr stated to me that each one of them had put up $1,000 for materials. Orr told me that he was cut out of the money in Cherokee County and replaced by Billy Brown. Billy Brown has a small construction company in Robbinsville, North Carolina and is a friend of Richard Greene and Keith Orr. Orr told me he had the contract in Cherokee County, but he gave it to Brown after he and Richard Greene learned questions were begin asked about Orr working in Cherokee County, when he was a full time employee in Graham County. Orr told me that most of the money billed for the cribbing structure by Orr in Graham County was actually due Richard Greene.

I was in the SWCD office on 10/19/95 when Lynne Brown, the spouse of Billy Brown, came to the SWCD office to see Green. Browne's wife went into Greene's office and I overheard her tell Greene that she was scared to death driving to the office because of the amount of money that she was carrying. I went to Greene's door to tell him that he had a phone call and I witnessed Lynne Brown giving cash to Richard Greene. There was not anyone else in the office. I do

not know how much money Lynne Brown gave to Richard Greene and I never discussed the incident with Greene. I received permission at a later date from SWCD Chairman Bruce Lewis to request some EWP records from the Cherokee County SWCD. The ledger records sent to our office from the Cherokee County SWCD show checks were given to Lynne Brown for Billy Brown in the amount of $9,669 on 10/19/95.

I received an invoice from P&S Rock Corporation of Robbinsville, North Carolina for rock rip rap work charged to the SWCD under the EWP work. P&S Rock Corporation did not bid or have a contract with the SWCD. I paid the invoice. I later contacted Randy Jordan of P&S Rock Corporation per the request of Graham County auditors and was told by him that Richard Greene had contacted him and he reached a verbal agreement with Greene to do the work.

I heard in the office from Richard Greene that the trees/timber that had fallen down after the flood along river beds and were to be used in cribbing structures had been stolen. I mentioned this to Keith Orr in his SWCD office in 1995, approximately 2 or 3 days after Richard Greene told me of the theft, and he told me that Richard Greene had done away with them and he did not know who Greene had sold them to.

I have read this statement consisting of 6 typed pages and it is true, correct, and complete to the best of my knowledge and belief. I have made all necessary additions and corrections and have signed each page.

Date: X 11-14-96

Signed: X Karen Wilson

Witness: A. Kenneth Golec
11/14/96

Witness: _____
A. Kenneth Golec
Special Agent
U.S. Department of Agriculture
Office of Inspector General
Atlanta, Georgia

Graham County Board of County Commissioners
P.O. Box 575
Robbinsville, NC 28771
(704) 479-7961
Fax (704) 479-7988

Raymond D. Williams Chairman	Dale Wiggins County Manager
Lynn Cody Vice-Chairman	Chester Jones County Attorney
Dale Wiggins Member	Jan Millsaps County Clerk

CODE OF CONDUCT

No employee, officer or agent of the grantee shall participate in the selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

a. The employee, Officer or agent;
b. Any member of his immediate Family;
c. His/Her partner, or
d. An organization which employs, or is about to employ, any of the above, has a financial or other interest is the firm selected for award.

The grantee's officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties in subagreements.

Grantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.

To the extent permitted by State or Local law or regulations, such standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's officers, employees, or agents, or by contractors or their agents.

Sincerely,

Dale Wiggins
Contracting Officer
County Manager of Graham

"Graham County Pride"

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Attachment to Graham CSWCD's Memorandum of Law in Support of Motion for Summary Judgment (filed Dec. 1, 2006) - Project Agreement between Graham County and the United States Department of Agriculture dated May 15, 1995

STATE North Carolina
PROJECT Emergency Watershed Protection-Graham County
CONTRACT NO. 69-4532-5-650

UNITED STATES DEPARTMENT OF AGRICULTURE
NATURAL RESOURCES CONSERVATION SERVICE

PROJECT AGREEMENT

THIS AGREEMENT, made this 5th day of June, 1995, by and between the Graham County Board of Commissioners, called the *Sponsors and the Contracting Local Organization*; and the Natural Resources Conservation Service, United States Department of Agriculture, called *NRCS*.

WITNESSETH THAT:

WHEREAS, under the provisions of Section 216 of Public Law 81-516, Emergency Watershed Protection Program, and Title IV of the Agricultural Credit Act of 1978, Public Law 95-334, NRCS is authorized to assist the Sponsors in relieving hazards created by natural disasters that cause a sudden impairment of a watershed:

NOW THEREFORE, in consideration of the premises and of the several promises to be faithfully performed by the parties hereto as set forth, the Sponsors, the Contracting Local Organization, and NRCS do hereby agree as follows:

A. The following described work is to be constructed for at the *agreed-to unit prices* shown in the attached Plan of Operations. This cost is estimated to be *$38,085.00.*

> Materials and labor for seedbed preparation, seeding, application of lime and fertilizer, mulching, tree planting, and placement of geotextile fabric filter cloth, rock riprap, and cribbing structures in the Cheoah River Watershed and tributaries, Graham County, North Carolina.

B. The Sponsors will:

1. Accept all financial and other responsibility for excess costs resulting from their failure to obtain, or their delay in obtaining, adequate land and water rights, permits, and licenses needed for the works of improvement described in A.

2. Enter into a separate project agreement for stream channel and streambank restoration, stream debris removal, and stream debris disposal at the project sites described in Section A.

3. If applicable, complete the attached "Clean Air and Water Certification," and comply with the attached "Clean Air and Water Clause."

4. Complete the attached "Certification Regarding Drug-Free Workplace Requirements (Grants) Alternative I - For Grantees Other Than Individuals", Form AD-1049, and comply with its contents.

C. The Contracting Local Organization will:

1. Provide 25 percent of the agreed-to price for the works of improvement described in Section A. The total of the work is estimated at $9,521.25.

2. Furnish all labor, equipment, and perform the work described in Section A. in accordance with specifications furnished by NRCS, and specifications furnished by the Contracting

Local Organization when concurred in by the State Administrative Officer.

3. Appoint a Contracting Officer and an authorized representative who shall have authority to act for the Contracting Officer, listing their duties, responsibilities, and authorities. Furnish such information in writing to the State Administrative Officer.

4. Carry out the work in accordance with the plan of operations heretofore prepared by the Contracting Local Organization and concurred in by the State Administrative Officer. Obtain the State Administrative Officer's concurrence before changing the plan of operations.

5. Be responsible for all administrative expenses necessary to arrange for and carry out the works of improvement described in Section A. These administrative matters include, but shall not be limited to, facilities, clerical expenses, and legal counsel, including the fees of such attorney or attorneys deemed necessary by NRCS to resolve any legal matters.

6. Arrange for and conduct final inspection of the completed work with NRCS to determine whether all work has been performed in accordance with specifications and the plan of operations.

7. Pay the suppliers and others as required to carry out the work. Submit billings to NRCS on Form SF-270.

8. Comply with Federal Executive Order 11246, which is made a part of this agreement by reference; comply with the nondiscrimination provisions of the Equal Opportunity Clause and Notice to Contracting Local Organizations of Requirement for Certification of Nonsegregated Facilities Clause attached hereto.

9. Assume full financial and all other responsibility for any work that must be torn out, replaced, or repaired because of construction error or other causes that would be the responsibility of a contractor if the work were performed by a construction contract.

10. Hold and save NRCS free from any and all claims or causes of action hatsoever resulting from the obligations undertaken by the Contracting Local Organization under this agreement or resulting from the work provided for in this agreement.

D. NRCS will:

1. Provide *75 percent* of the agreed-to price for the works of improvement described in Section A. The total of the work is estimated at *$28,563.75*.

2. Provide authorized assistance such as drawings and specifications for carrying out the plan of operations.

3. Provide the services of a Government Representative.

4. Provide the services of Government Inspectors, as necessary.

5. Make payment to the Contracting Local Organization covering NRCS's share of the cost upon receipt and approval of Form SF-270.

E. It is mutually agreed that:

1. This agreement shall become null and void 90 calendar days after the date NRCS has executed this agreement in the event the work has not been commenced.

2. NRCS may terminate this agreement in whole or in part if it is determined by NRCS that the Sponsors or the Contracting Local Organization have failed to comply with any of the conditions of this agreement. NRCS shall promptly notify the Sponsors and Contracting Local Organization in writing of the determination and reasons for the termination, together with the effective date. Payments made by or recoveries made by NRCS under this termination shall be in accord with the legal rights and liabilities of NRCS, the Contracting Local Organization, and the Sponsors.

3. This agreement may be temporarily suspended by NRCS if NRCS determines that corrective action by the Contracting Local Organization or the Sponsors is needed to meet the provisions of this agreement. Further, NRCS may suspend this agreement

when it is evident that a termination is pending.

4. NRCS, at its sole discretion, may refuse to cost share should the Contracting Local Organization elect to proceed without obtaining concurrence as set out in Section C. of this agreement.

5. No member of or delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this agreement if made with a corporation for its general benefit.

6. The furnishing of the administrative and technical services by NRCS as set out in Sections D.2. through D.4. is contingent upon the continuing availability of appropriations by the Congress from which payment may be made and shall not obligate NRCS if the Congress fails to so appropriate.

7. The program or activities conducted under this agreement will be in compliance with the nondiscrimination provisions contained in the

> Titles VI and VII of the Civil Rights Act of 1964, as amended; the Civil Rights Restoration Act of 1987 (Public Law 100-259); and other nondiscrimination statutes: namely, Section 504 of the Rehabilitation Act of 1973; Title IX of the Education Amendments of 1972, and the Age Discrimination Act of 1975. They will also be in accordance with regulations of the Secretary of Agriculture (7 CFR-15, Subparts A & B), which provide that no person in the United States shall on the grounds of race, color, national origin, age, sex, religion, marital status, or handicap be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving federal financial assistance from the Department of Agriculture or any agency thereof.

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Attachment to Graham CSWCD's Memorandum of Law in Support of Motion for Summary Judgment (filed Dec. 1, 2006) - Project Agreement between Graham County and the United States Department of Agriculture dated May 15, 1995

GRAHAM COUNTY BOARD OF COMMISSIONERS
By: /s/Raymond D. Wilham
Title: Chairman
Date: 5/15/95

This action authorized at an official meeting of Graham County Board of Commissioners on the 15th day of May, 1995, at Robbinsville, State of North Carolina

/s/ Dale E. Wiggins
(Signature)

County Manager
(Title)

UNITED STATES DEPARTMENT OF AGRICULTURE
NATURAL RESOURCES CONSERVATION SERVICE
By: /s/ [signature illegible]
Title: State Administrative Officer
Date: 6/5/95

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Attachment to Graham CSWCD's Memorandum of Law in Support of Summary Judgment (filed Dec. 1, 2006) - Excerpts of Dale Wiggins September 29, 2006 Deposition

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION
NO. 2:01-CV-19T

[full caption omitted in printing]

DEPOSITION OF DALE WIGGINS
Friday, September 29, 2006

[Reporter and Attorney Information and Table of Contents Omitted]

[97]

* * * * *

Q. I just have a couple of followup questions. Do you recall who the auditors were for Graham County?

A. Auditors? As far as Graham County government's general annual audit-type thing, the finances -- Crisp and Hughes.

Q. Did they send you a letter each you with the results of the audit.

A. Yes, generally.

* * * * *

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Attachments to Graham County's Motion for Summary Judgment (filed Dec. 1, 2006) - Excerpts of Dale Wiggins' August 16, 2006 Deposition

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION
NO. 2:01-CV-19T

[full caption omitted in printing]

DEPOSITION OF DALE WIGGINS
Wednesday, August 16, 2006

[Reporter and Attorney Information and Table of Contents Omitted]

[70]

* * * * *

Q Number 15 talks about preparing for SF-270 Request for Advance of Reimbursement and then sign on behalf of the county. Do you recall doing that?

A Initially, the form 270 was, if I recall, something that Mr. Greene helped me prepare and submit. It may – there may have been a point reached that I was familiar enough with that document to do that request myself. I don't recall if Mr. Greene helped on all of them or

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some of them or part of them or what.

Q You signed all of them?

A To the best of my knowledge. Yes.

Q Number 17, "Where conditions justify, declare the contract in default." Did that ever happen?

A Not that I recall. No.

Q "Make all records dealing with the awarding and administering of the contract available for review by authorized representative of the federal government." Did you do that?

A All the records were made - - were public record and were kept in a file within the county offices there for review by anyone that requested to review.

* * * * *

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Attachments to Keith Orr's Motion for Summary Judgement (filed Dec. 1, 2006) - Excerpts of Karen Wilson's August 17, 2006 Deposition

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION
NO. 2:01-CV-19T

[full caption omitted in printing]

DEPOSITION OF KAREN WILSON
Thursday, August 17, 2006

[Reporter and Attorney Information and Table of Contents Omitted]

[35]

Q You weren't working in Cherokee County; right?

A Right.

Q When did you get this copy? Was it provided to you from Karen Bates? Was it provided to you from the Cherokee office? Did you go and make a public records request? I hate to keep asking the question, but I don't seem to be getting an answer. When did you see this copy?

A What did I see the copy of - - -

Q The complete copy.

A The complete copy that had been filled out by Cherokee County Soil and Water Conservation District?

Q Right.

A I don't recall. Because it did come in increments. So I'm not going to tell you that I saw a complete copy at any given time because it was done in performance of work. Various contracts were done at different times. But yes, as far as requesting documents, I requested them on a steady basis from Karen Bates as they were happening because I knew there was problems with this.

Q You knew there were problems with this?

A Yes.

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Q When did you start asking for these documents from Karen Bates?

A Immediately.

Q When is immediately? I need a date.

A As soon as they started happening. I'm not - - I cannot give you the date that they started happening. It was - - I'm going to say between March and May of '95. It was for the flood of

February '95. So paperwork started fairly quickly.

Q But you can't give me a date?

A No.

* * * * *

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* * * * *

Q You used the copier there at the office to make all these copies to conduct this investigation that you were conducting?

A No. Not all of the copies because a lot of the copies came from other entities.

Q What other entities did these copies come from?

A The Farm Services Agency, Graham County Commissioners, Cherokee County Soil and Water Conservation District, the State Soil and Water Conservation Commission, DENR, the -- there's probably other entities that I requested information from. The OIG -- various entities.

Q You requested all this information from these
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various parties before you filed your complaint in this case; didn't you?

A A lot of it, yes. I have it in my hand.

Q Who all did you request this information from before you filed your complaint? I just need to know everyone you requested information from?

A Pretty much everybody that I just named.

Q You used that information, at least in part, in formulating your complaint and your allegations in this case; didn't you?

A Information that I had knowledge of that I requested. Yes.

Q With respect to Cherokee County in particular, you didn't have access to any information in Cherokee County unless you specifically requested it from them; did you?

A No.

Q What was Karen Bates' position in Cherokee County?

A District secretary.

* * * * *

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Attachment to Karen Wilson's Opposition to Graham CSWCD's Motion for Summary Judgment (filed Dec. 18, 2006) - Sharon Holloway's Declaration and Attachments

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION
NO. 2:01-CV-19T

[full caption omitted in printing]

DECLARATION OF SHARON HOLLOWAY

I, Sharon Holloway, declare as follows:

1. I formerly worked for Graham County, North Carolina, including the 1995-1996 time period. At that time, I was the Finance Officer for the County and my name was Sharon Crisp.

2. Sometime soon after April 26, 1996, I received documents and a cover letter of that date from the auditing firm of Crisp & Hughes. Enclosed with the letter were four copies of a Report produced by that firm. A true and correct copy of the cover letter and enclosed report is attached hereto. The cover letter indicates a copy had been sent to the Graham County Commission.

3. I read the Report at about the time that I received it. The Report lists several problems and errors with the administration of the EWP program, including: "Certain portions of the project were

completed by an individual who was an approved project inspector. This appears to be a violation of the County's code of conduct which was submitted in certifications as prerequisite to establishing project agreements with the USDA." I knew that the individual referred to was Keith Orr.

4. At about this time, I also had conversations with Karen Wilson in which she expressed concern about the legality of payments to Keith Orr under the EWP program.

5. On July 12, 1996, County Manager Dale Wiggins presented me with a Purchase Order to Keith Orr for "EWP Projects." I had very serious concerns about paying the Purchase Order, which I expressed to Mr. Dale Wiggins. He ordered me to sign the check.

6. Because of my concerns about making the payment to Keith Orr, I wrote a brief memorandum to the Graham County Commissioners stating that I was writing the check to Keith Orr "under duress and against my will and better judgment." I then had the memorandum notarized, and I delivered it along with the check. A true and correct copy of the memorandum is attached hereto. The act of writing the memorandum was done on my own initiative to make it clear that I did not agree with

the payment to Keith Orr. I understand that Dale Wiggins testified at his deposition that he suggested that I write the memorandum. Such a statement is false.

7. During the time of the administrations of the EWP program in 1995-1995, Richard Greene and Keith Orr came into my office on one occasion and asked that I destroy some documents relating to payments under the EWP program. I refused to do so.

I declare under penalty of perjury that the foregoing is true and correct.
Dated: December 15, 2006.

[s] Sharon Holloway
Sharon Holloway

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Attachment to Karen Wilson's Opposition to Graham CSWCD's Motion for Summary Judgment (filed Dec. 18, 2006) - Sharon Holloway's Declaration and Attachments

[Logo Omitted]
April 26, 1996

Sharon Crisp
Graham County Accountant
Graham County
PO Box 575
Robbinsville, NC 28771

Dear Sharon:

Enclosed please find four copies of our Agreed Upon Procedures Report for Graham County, North Carolina, for the period March 27, 1995 through November 8, 1995. I have sent one copy to the Local Government Commission and one copy to Donna Moffitt at the NC Division of Soil and Water Conservation. I have provided two copies for the County's records, as well as one copy for the Graham County Soil and Water Conservation District and one copy for the US Department of Agriculture, should you be required to distribute copies to them.

If you have any questions, please do not hesitate to contact me.

Very truly yours,
CRISP, HUGHES & CO.
/s/ Gwen L. Edwards
Gwen L. Edwards, CPA
Manager

GLE/wp
Enclosure

GRAHAM COUNTY

Agreed Upon Procedures Report

For the Period
March 27, 1995 through November 8, 1995

[Logo Omitted]
Board of Commissioners
Graham County
Robbinsville, North Carolina

We have applied the procedures enumerated below with respect to the books and records of Graham County for the period beginning March 27, 1995 and ending November 8, 1995. These procedures, which were agreed to by Graham County, were performed solely to assist you in determining that the books and records of Graham County have been adequately maintained. This report is intended solely for your information and should not be used by those who did not participate in determining the procedures.

The procedures we performed are summarized as follows:

1. We obtained all Project Agreements between the US Department of Agriculture and Graham County in relation to the Emergency Watershed Protection Project.

2. We obtained all Federal reports prepared by the Soil and Water Conservation District in regard to the Emergency Watershed Protection Project, including all Requests for Advance or

Reimbursement and checked them for mathematical accuracy.

3. We obtained supporting documentation for Requests for Reimbursement and compared to the requests filed with the US Department of Agriculture.

We did not conduct interviews of the personnel involved in the project, not did we visit the sites where work was performed.

The results of our performance of these agreed upon procedures are shown in the accompanying schedule (Exhibit A).

Because the above procedures do not constitute an audit made in accordance with generally acceptable auditing standards, we do not express an opinion on the financial position of Graham County as of and for the period beginning March 27, 1995 and ending November 8, 1995, or on the information shown in Exhibit "A". Had we performed additional procedures or had we made an audit of the financial statements in accordance with generally accepted auditing standards, other matters might have come to our attention that would have been reported to you. This report is related to only the accounts and items

specified above and does not extend to any financial statements of Graham County taken as a whole.

/s/ CRISP HUGHES CO, L.L.P.
March 13, 1996

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Attachment to Karen Wilson's Opposition to Graham CSWCD's Motion for Summary Judgment (filed Dec. 18, 2006) - Sharon Holloway's Declaration and Attachments

Exhibit "A"

GRAHAM COUNTY
SUMMARY OF AGREED UPON PROCEDURES

Item #1. Copies of Emergency Watershed Protection Project Contracts No. 69-4532-5-630 and 69-4532-5-650 were obtained from Graham County's files and the Graham County Soil and Water Conservation District's files. The files maintained in the Waynesville District Office of the USDA, Natural Resource Conservation Service were also examined. It was noted that contract terms relating to cost of rip-rap, area to be seeded, cribbing assembly, and specification of the organization to perform the actual work as specified in the original project agreements for contract no. 69-4532-5-650 obtained in the Graham County files did not agree to the copy obtained from the USDA NRCS Waynesville District office. It was further noted that no copies of amendments to the project agreements were maintained in the County's or the Graham County Soil and Water Conservation District's files and had to be

obtained from the USDA NRCS Waynesville District office files.

Item #2. Contract No. 66-4532-5-630
We noted minor clerical reporting errors, but reports as submitted were correct in total. No other exceptions noted.

Contract No. 66-4532-5-650
No exceptions noted.

Item #3. Contract No. 66-4532-5-630
No exceptions noted.
Contract No. 66-4532-5-650
We noted several instances where invoices submitted to the County for payment were extended incorrectly, causing the County to pay more than the invoice details supported. This resulted in $192 in questioned costs.

Requests for reimbursement were not supported by invoices or other documentation dated prior to the date of the reimbursement request. Project expenditure totals on final reimbursement requests were reconcilable to expenditure

documentation except for those errors reported in the paragraph above.

Certain portions of the project were completed by an individual who was an approved project inspector. This appears to be a violation of the County's code of conduct which was submitted in certifications as prerequisite to establishing project agreements with the USDA.

G.S. 143-131 requires contracts for construction or repairs costing from $5,000 to $50,000 to be awarded in accordance with an informal bidding process. The statue requires that a record of all such bids be kept. No documentation was available to indicate that informal bid requirements had been complied with.

See the accompanying Accountants' Agreed Upon Procedures Report.

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Attachment to Karen Wilson's Opposition to Graham CSWCD's Motion for Summary Judgment (filed Dec. 18, 2006) - Karen Wilson December 18, 2006 Declaration

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION
NO. 2:01-CV-19T

[full caption omitted in printing]

Declaration of Karen Wilson

I, Karen Wilson, declare as follows based on my personal knowledge unless otherwise specifically noted:

1. The document that is exhibit 2 to my deposition taken in this case on August 17, 2006, is a statement made by me. The facts that I asserted in that statement are true and correct.

2. I did not derive any of the allegations in my complaints supporting the claims against any of the current defendants from public disclosures of any sort. Instead, all of the allegations are from my personal observations or private inquiries, or otherwise obtained from non-public sources.

3. From late 1995 and into 1998, I was interviewed numerous times by various federal and state law

enforcement officials regarding the events set forth in the Third Amended Complaint. During those interviews, I discussed and disclosed all of the material allegations in the Third Amended Complaint, although I did not disclose all of that information during any one interview.

4. I am stating that when I approached Dale Wiggins Graham County Manager and Commissioner during 1995 with concerns of wrongdoing in the Graham County SWCD I did tell him about the illegal sales of filter fabric by NRCS employee Richard Greene thru his wife Cherie Greenes beauty shop "Fantasia". Therefore stating that he was made aware of the illegal activities being conducted at the time.

I hereby declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 18th day of December, 2006.

/s/ Karen Wilson
Karen Wilson

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Attachment to Reply Brief in Support of Graham County's Motion for Summary Judgment (filed Dec. 28, 2006) - Project Agreement between Cherokee County and U.S. Department of Agriculture (Project 640)

STATE North Carolina
PROJECT Emergency Watershed Protection-Cherokee County
CONTRACT NO. 69-4532-5-640

UNITED STATES DEPARTMENT OF AGRICULTURE

NATURAL RESOURCES CONSERVATION SERVICE

PROJECT AGREEMENT

THIS AGREEMENT, made this 4th day of May, 19 95, by and between the Cherokee County Board of Commissioners, called the *Sponsors* and the *Contracting Local Organization*; and the Natural Resources Conservation Service, United States Department of Agriculture, called *NRCS*.

WITNESSETH THAT:

WHEREAS, under the provisions of Section 216 of Public Law 81-516, Emergency Watershed Protection Program, and Title IV of the Agricultural Credit Act of 1978, Public Law 95-334, NRCS is authorized to assist the Sponsors in relieving hazards created by natural

disasters that cause a sudden impairment of a watershed:

NOW THEREFORE, in consideration of the premises and of the several promises to be faithfully performed by the parties hereto as set forth, the Sponsors, the Contracting Local Organization, and NRCS do hereby agree as follows:

A. The following described work is to be constructed for at the agreed-to unit prices shown in the attached Plan of Operations. This cost is estimated to be *$66,520.00*.

Materials and labor for seedbed preparation, seeding, application of lime and fertilizer, mulching, tree planting, and placement of geotextile fabric filter cloth in the Hiwassee and Valley Rivers Watersheds and tributaries, Cherokee County, North Carolina.

B. The Sponsors will:

1. Accept all financial and other responsibility for excess costs resulting from their failure to obtain, or their delay in obtaining, adequate land and water rights, permits, and licenses

needed for the works of improvement described in A.

2. Enter into a separate project agreement for stream channel and streambank restoration, stream debris removal, and stream debris disposal at the project sites described in Section A.

3. If applicable, complete the attached "Clean Air and Water Certification," and comply with the attached "Clean Air and Water Clause."

4. Complete the attached "Certification Regarding Drug-Free Workplace Requirements (Grants) Alternative I - For Grantees Other Than Individuals", Form AD-1049, and comply with its contents.

C. The Contracting Local Organization will:

1. Provide 25 percent of the agreed-to price for the works of improvement described in Section A. The total of the work is estimated at *$16,630.00*.

2. Furnish all labor, equipment, and perform the work described in Section A. in accordance with

specifications furnished by NRCS, and specifications furnished by the Contracting Local Organization when concurred in by the State Administrative Officer.

3. Appoint a Contracting Officer and an authorized representative who shall have authority to act for the Contracting Officer, listing their duties, responsibilities, and authorities. Furnish such information in writing to the State Administrative Officer.

4. Carry out the work in accordance with the plan of operations heretofore prepared by the Contracting Local Organization and concurred in by the State Administrative Officer. Obtain the State Administrative Officer's concurrence before changing the plan of operations.

5. Be responsible for all administrative expenses necessary to arrange for and carry out the works of improvement described in Section A. These administrative matters include, but shall not be limited to, facilities, clerical expenses, and legal counsel, including the fees of such attorney or attorneys deemed necessary by NRCS to resolve any legal matters.

6. Arrange for and conduct final inspection of the completed work with NRCS to determine whether all work has been performed in accordance with specifications and the plan of operations.

7. Pay the suppliers and others as required to carry out the work. Submit billings to NRCS on Form SF-270.

8. Comply with Federal Executive Order 11246, which is made a part of this agreement by reference; comply with the nondiscrimination provisions of the Equal Opportunity Clause and Notice to Contracting Local Organizations of Requirement for Certifications of Nonsegregated Facilities Clause attached hereto.

9. Assume full financial and all other responsibility for any work that must be torn out, replaced, or repaired because of construction error or other causes that would be the responsibility of a contractor if the work were performed by a construction contract.

10. Hold and save NRCS free from any and all claims or causes of action hatsoever resulting

from the obligations undertaken by the Contracting Local Organization under this agreement or resulting from the work provided for in this agreement.

D. NRCS will:

1. Provide 75 percent of the agreed-to price for the works of improvement described in Section A. The total of the work is estimated at $49,890.00.

2. Provide authorized assistance such as drawings and specifications for carrying out the plan of operations.

3. Provide the services of a Government Representative.

4. Provide the services of Government Inspectors, as necessary.

5. Make payment to the Contracting Local Organization covering NRCS's share of the cost upon receipt and approval of Form SF-270.

E. It is mutually agreed that:

1. This agreement shall become null and void 90 calendar days after the date NRCS has executed this agreement in the event the work has not been commenced.

2. NRCS may terminate this agreement in whole or in part if it is determined by NRCS that the Sponsors or the Contracting Local Organization have failed to comply with any of the conditions of this agreement. NRCS shall promptly notify the Sponsors and Contracting Local Organization in writing of the determination and reasons for the termination, together with the effective date. Payments made by or recoveries made by NRCS under this termination shall be in accord with the legal rights and liabilities of NRCS, the Contracting Local Organization, and the Sponsors.

3. This agreement may be temporarily suspended by NRCS if NRCS determines that corrective action by the Contracting Local Organization or the Sponsors is needed to meet the provisions of this agreement. Further, NRCS may suspend this agreement when it is evident that a termination is pending. .

4. NRCS, at its sole discretion, may refuse to cost share should the Contracting Local Organization elect to proceed without obtaining concurrence as set out in Section C. of this agreement.

5. No member of or delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this agreement if made with a corporation for its general benefit.

6. The furnishing of the administrative and technical services by NRCS as set out in Section D.2. through D.4. is contingent upon the continuing availability of appropriations by the Congress from which payment may be made and shall not obligate NRCS if the Congress fails to so appropriate.

7. The program or activities conducted under this agreement will be in compliance with the nondiscrimination provisions contained in the Titles VI and VII of the Civil Rights Act of 1964, as amended; the Civil Rights Restoration Act of 1987 (Public Law 100-259); and other

nondiscrimination statutes; namely, Section 504 of the Rehabilitation Act of 1973; Title IX of the Education Amendments of 1972, and the Age Discrimination Act of 1975. They will also be in accordance with regulations of the Secretary of Agriculture (7 CFR-15, Subparts A & B), which provide that no person in the United States shall on the grounds of race, color, national origin, age, sex, religion, marital status, or handicap be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving federal financial assistance from the Department of Agriculture or any agency thereof.

CHEROKEE COUNTY BOARD OF COMMISSIONERS
By: /s/[signature illegible]
Title: Chairman
Date: 5/1/95

This action authorized at an official meeting of Board of County Commissioners on the 1st day of May, 1995, at Murphy, State of North Carolina.

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Attachment to Reply Brief in Support of Graham County's Motion for Summary Judgment (filed Dec. 28, 2006) - Project Agreement between Cherokee County and U.S. Department of Agriculture (Project 640)

/s/ [signature illegible]
(Signature)

Clerk to the Board
(Title)

UNITED STATES DEPARTMENT OF AGRICULTURE
NATURAL RESOURCES CONSERVATION SERVICE
By: /s/ [signature illegible]
Title: State Administrative Officer
Date: 5-4/95

[illegible] Conservation District
[illegible] Box 286 [stamp]
Robbinsville, N.C. 28771

[Postmark]
P&D Asheville, N.C. 288 12/07/95 PM

Attn: Jacob Crandall [handwritten]
Soil Conservation Services, USDA
P.O. Box 1109
Waynesville, North Carolina 28786

[bar code]

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Attachment to Unopposed Motion to Supplement District Court Record to Add Missing Attachment to Defendant's Summary Judgment (filed Nov. 15, 2007) - Letter from Karen Wilson to Gallo December 7, 1995

[Logo Omitted]
December 7, 1995

Dear Mr. Gallo,

I am writing in reference to questions concerning the NCACSP and the EWP-216 Project being done in Graham County. I was contacted and ask to send documentation of my concerns to you.

H. Richard Greene has cost shared funds from the NCACSP in the names of G & L Farms (Greene & Lane), being signed by Joyce L. Lane, also in Cherie Greene, Richards wife, and Charles Lane, Sr., Joyce Lanes ex-husband. Joyce Lane left Graham County approximately 2 years ago. Therefore, not only is her name being used without her knowledge, but someone is cashing the checks made out in her name. More importantly, if you check it will be found that none of the properties listed on the plans are owned by any of the above mentioned. No other landowners signed these applications. None of the last plans done were ever approved by the Graham County SWCD. Richard did the last plan while I was serving federal jury duty in Bryson City using the signature stamp of Bruce Lewis, Chairman of Graham SWCD. When I told Bruce about finding this he contacted Richard and he explained that he had done this to keep Graham County from loosing NCACSP funds.

As for the EWP-216 Project we are now being audited by county auditors.

I was told by Keith Orr, NCACSP technician that when the EWP-216 project began in Graham & Cherokee counties that he, Richard Greene, & William Timpson each put up $1000.00 to buy materials and were doing the cribbing and seeding themselves, dividing any profits in both counties. The money in Graham County has been paid to Keith Orr, and the money in Cherokee county has been paid to Billy Brown. I have been present when Richard, Bill, & Keith cashed checks and divided the money. The auditors informed me that Keith as a salaried employee should of never received these funds. The SWCD was told by Richard Greene that Graham County gave the Performance of Work contract to Keith Orr. He told the county manager that the SWCD contracted the work to Keith Orr. No contract ever existed with anyone. Also, Keith Orr was appointed as inspector of these job sites. Most of the time the SWCD and Graham County has been misinformed and kept in the dark continously about the project and the funds.

Richard Greene has done the billing for Graham County's EWP Project and has given me the figures the SWCD has billed to Graham County. None of the

figures match therefore a huge problem exists, because we don't know who was billed for what, or why. This is when the auditors come into the picture. Realizing things were being question Richard Green & Keith Orr went to the Graham County Finance Officer and ask her to tear up my paperwork and let him change the figures. Also, he came back to the office and told me he had met with the county manager and all I needed to do was bill the county for 1000 ft. of seeding. The county manager was in another town in a meeting. This can be verified by Sharon Crisp finance officer at 704-479-7970.

I could write much more but I know your time is valuable. I am concerned because Graham County is very rural and these programs are badly needed here if they are administered properly. We have received countless complaints about Richard not returning phone calls, not doing CFSA technical assistance and not attending board meetings to answer questions or to work with the SWCD.

I will be happy to answer any questions you have. Please feel free to call at 704-479-8562 or home 704-479-7450.

Sincerely
/s/ Karen Wilson

United States ex rel. Wilson v. Graham County SWCD, et al., 2:01CV19T - Attachment to Unopposed Motion to Supplement District Court Record to Add Missing Attachment to Defendant's Summary Judgment (filed Nov. 15, 2007) - Handwritten Note from Karen Wilson to Jacob Crandall dated December 7, 1995

Attn: Jacob Crandall,

Please know that this has gotten very serious in Graham County. Richard & Keith are being very ugly & my family is very upset. If it continues I'm afraid serious things are going to happen.

I apologize for any inconvenience, please know I am doing this out of concern not maliace. I'm not sure if this is what you need so please call if you have questions.

Sincerely,

/s/ Karen Wilson

PETITIONER'S BRIEF

FOR ARGUMENT
138

No. 08-304

Supreme Court, U.S.
FILED
AUG 27 2009
OFFICE OF THE CLERK

In the

Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE PETITIONERS

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*Counsel of Record

August 2009

BOC 42XLX5

QUESTION PRESENTED

Whether an audit or investigation performed by a State or its political subdivision constitutes an "administrative . . . report . . . audit, or investigation" within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioners are Graham County Soil & Water Conservation District, Gerald Phillips, Allen Dehart, Lloyd Millsaps, Cherokee County Soil & Water Conservation District, Bill Tipton, C.B. Newton, Eddie Wood, Graham County, Raymond Williams, Dale Wiggins, Lynn Cody and Keith Orr.

Richard Greene, Billy Brown and William Timpson were parties to the proceedings below but did not join in the petition.

The respondent is the United States of America ex rel. Karen T. Wilson.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-46a) is reported at *United States ex rel. Wilson v. Graham County Soil & Water Conservation District*, 528 F.3d 292 (4th Cir. 2008). The opinion of the district court (Pet. App. 47a-152a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 9, 2008. Pet. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the jurisdictional bar of the False Claims Act which provides:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought

> by the Attorney General or the person bringing the action is an original source of the information.
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> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4) (2006). The False Claims Act is set out in the appendix to the petition for writ of certiorari at 153a-188a.

Subsequent to the filing of the petition for writ of certiorari, Congress amended certain provisions of the False Claims Act. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617. This Act did not amend the language of 31 U.S.C. § 3730(e)(4).

STATEMENT

1. The False Claims Act establishes civil penalties in connection with the presentment of a false or fraudulent claim for payment by the United

States. 31 U.S.C.S. § 3729(a)(1) (LexisNexis 2009). An action to recover statutory damages and civil penalties may be brought by the Attorney General or by a private person ("relator" or "*qui tam* plaintiff") in the name of the United States. 31 U.S.C. § 3730(a), (b) (2006). When a relator brings such an action, the United States may intervene and pursue the prosecution of the claim or decline to participate in the proceeding. 31 U.S.C. § 3730(b)(2) (2006). Regardless of whether the United States chooses to intervene, the relator stands to recover a monetary reward (ranging from 10 to 30% of the recovery, plus attorneys' fees) for filing the action. 31 U.S.C. § 3730(d) (2006).

Congress included a public disclosure bar in the False Claims Act to preclude opportunistic plaintiffs from filing *qui tam* actions based on the work of others. 31 U.S.C. § 3730(e)(4)(A) (2006). Under the public disclosure bar, a private person generally cannot bring a *qui tam* action based on the following public information: "allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." *Id.* (Pet. App. 163a). If, however, the plaintiff is the original source of the information, the public disclosure bar does not preclude the action from being brought. *Id.*

2. In February 1995, a storm struck portions of western North Carolina, causing flooding and

erosion. Following that storm, Cherokee County and Graham County separately applied for federal assistance under the Emergency Watershed Protection ("EWP") Program. *See* 16 U.S.C. § 2203 (2006); 7 C.F.R. §§ 624.1 to .11 (2009). Pursuant to the terms of that federal program, each county entered into a project agreement with the United States Department of Agriculture ("USDA"). Under those agreements, the counties agreed to pay 25% of cleanup costs and the USDA agreed to pay the remaining 75%. J.A. 99-108 (Graham County agreement dated June 5, 1995); J.A. 129-38 (Cherokee County agreement dated May 4, 1995). In each county, the work performed under the EWP Program was coordinated by the local soil and water conservation district under the direction of a USDA employee. Pet. App. 8a, 57a-59a, 86a.

Because these two counties receive federal funds, the counties are required, under the Single Audit Act, to file annually a financial audit with the federal government. 31 U.S.C. § 7502(h) (2006).[1]

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[1] The Single Audit Act currently exempts States and local governments that receive less than $500,000 in total federal funds from the Act's audit requirements. 31 U.S.C. § 7502(a)(2)(A) (2006) (setting $300,000 threshold); United States Office of Management & Budget, Audits of State, Local Governments, and Non-Profit Organization, 68 Fed. Reg. 38,401 (June 27, 2003) (revision of OMB Circular No. A-133) (setting $500,000 threshold for fiscal years ending on or after January 1, 2004). At all times relevant to the

The audit must be prepared by an independent auditor. 31 U.S.C. § 7502(c) (2006). Consistent with this federal requirement, Graham County retained the independent accounting firm of Crisp & Hughes to conduct its annual audits. J.A. 109. Under the Single Audit Act, the auditor must report to the federal government any non-compliance with laws and regulations discovered as a result of the audit. 31 U.S.C. § 7502(c), (g)(2) (2006). In addition to the audit itself, the Single Audit Act provides that the federal government shall have access to all of the auditor's working papers with respect to the audit. 31 U.S.C. § 7503(f) (2006).[2] The audits that are filed

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complaint, the threshold was $25,000. Single Audit Act of 1984, Pub. L. No. 98-502, 98 Stat. 2327, 2329 (former 31 U.S.C. § 7502(a)(1)(B)).

[2] The Single Audit Act was amended in 1996 to provide that the federal government has a right of access to the auditor's workpapers. Act of July 5, 1996, Pub. L. No. 104-156, 110 Stat. 1401. Prior to 1996, the Act did not expressly refer to auditor's workpapers, but simply stated that the Act does not supercede the provisions of other statutes and regulations relating to maintenance and access to records. The amendment, however, merely codified the numerous agency regulations that required that the workpapers of independent auditors be made available to the United States. For example, at the time of the work at issue in this action, the Department of Agriculture's regulations provided: "Workpapers and reports shall be retained for a

by States and local governments are available to the public through a federal clearinghouse. 31 U.S.C. § 7502(h).

Under North Carolina law, all local government audits required by the federal Single Audit Act must be filed with the North Carolina Local Government Commission. N.C. Gen. Stat. § 159-34 (2007). The Commission requires that the auditor's workpapers be available to both the state and federal government upon request. North Carolina Local Government Commission, Audit Requirements, at 35-E-1.26 (revised June 2005) (available at www.nctreasurer.com; search term "35E12007.doc").

In connection with its audit of Graham County's expenditure of federal funds, Crisp & Hughes prepared an "Agreed Upon Procedures" report in March 1996 (the "Crisp & Hughes Audit Report").[3] J.A. 119-26. This audit report addressed several issues with respect to the County's expenditures under the EWP Program, including whether the work at issue should have been sent out for bids. Among the other items identified in the audit, the report notes that:

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minimum of three years from the date of the audit report . . . . Audit workpapers shall be made available upon request . . . ." 7 C.F.R. § 3015.75(c) (1995).

[3] An "agreed upon procedures report" is an informal audit that addresses specific questions concerning financial records and issues. Pet. App. 92a.

> [North Carolina General Statutes Section] 143-131 requires contracts for construction or repairs costing from $5,000 to $50,000 be awarded in accordance with an informal bidding process. The statute requires that a record of all such bids be kept. No documentation was available to indicate that informal bid requirements had been complied with.

J.A. 126. In the cover letter to the report, Crisp & Hughes stated that copies of the report had been transmitted to the North Carolina Local Government Commission and the Division of Soil and Water Conservation of the North Carolina Department of Environment, Health and Natural Resources. J.A. 119. The letter noted that multiple copies were enclosed for transmittal to the United States Department of Agriculture. *Id.*

The Crisp & Hughes Audit Report was readily available to both the federal government and the public. First, the document constitutes a public record under North Carolina law and was available to the public from both Graham County and the North Carolina Local Government Commission. N.C. Gen. Stat. § 132-1 to -10 (2007). Second, the document was prepared by Crisp & Hughes as part of its review of Graham County's expenditures of

federal funds. Accordingly, the document was available to the federal government in connection with the annual audit required by federal law. *See* 7 C.F.R. § 3015.75(c) (1995). Third, the work of the Graham County Soil & Water Conservation District was under the direct supervision of a federal employee. Richard Greene, a District Conservationist for the United States Department of Agriculture, worked out of the offices of the Graham County Soil & Water Conservation District and directed all of the work performed by it. Pet. App. 8a, 86a. This federal employee selected the contractor to do the work at issue, prepared the forms for the County to request reimbursement for the work, and advised the local district that the work at issue need not be sent out for bids. Pet. App. 9a, 57a-59a, 62a-63a, 72a-73a, 86a. In fact, respondent concedes that Greene ran the district and was "in charge of the entire operation." Pet. App. 128a-29a; *accord* Pet. App. 136a. Thus, the on-site federal employee responsible for this program was aware of every aspect of the operation of the district.

Respondent Karen Wilson, a part-time secretary employed by the Graham County Soil & Water Conservation District, began voicing various concerns about the operation of the district in December 1995. Wilson, however, did not voice any concern about the need to bid the work performed under the EWP Program until after the Crisp &

Hughes Audit Report was available to her. *See* Pet. App. 96a. In her deposition, Wilson readily admitted that she obtained documents from various local, state and federal entities in her attempt to prepare her claims against petitioners.[4] J.A. 112-15.

3. On January 25, 2001, Wilson filed a *qui tam* action and retaliatory discharge claim against Graham County Soil & Water Conservation District, Graham County, Cherokee County Soil & Water Conservation District and various individuals.[5] *See* 31 U.S.C. § 3730(b) (2006) (*qui tam* provisions); 31 U.S.C.S. § 3730(h) (LexisNexis 2009) (retaliatory discharge provisions). The United States declined to intervene in the action. *See* 31 U.S.C. § 3730(b)(2).

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[4] In addition to the March 1996 audit, a May 1996 report prepared by the North Carolina Department of Environment and Natural Resources ("May 1996 DEHNR Report") also addresses various items that were later made the subject of plaintiff's complaint. Like the county audit, this document constitutes a public record under state law. N.C. Gen. Stat. § 132-1 to -10 (2007).

[5] This Court addressed the statute of limitations applicable to Wilson's retaliatory discharge action in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005). Following remand from this Court, the Fourth Circuit dismissed Wilson's retaliatory discharge action as time barred. *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 424 F.3d 437 (4th Cir. 2005).

Plaintiff asserted various claims of mismanagement by the Graham County and Cherokee County conservation districts, including an allegation that the work under this federal program was required to be sent out for bids, which was not done. Specifically, the complaint alleges that various payments made by the counties were "improper . . . because there had been no bidding on the contract as required by the EWP-216 program." J.A. 16, 21 (Third Amended Complaint, ¶ 31(a), (n)).

On March 13, 2007, the district court held that plaintiff's claims are jurisdictionally barred pursuant to 31 U.S.C. § 3730(e)(4)(A). The district court held, in the alternative, that defendants are entitled to summary judgment on the merits of plaintiff's claims.

In its decision, the district court concluded that a state audit or investigation is sufficient to constitute a public disclosure under 31 U.S.C. § 3730(e)(4)(A). Pet. App. 95a-97a. The district court further found that Wilson had based her complaint on the March 1996 Crisp & Hughes Audit Report and the May 1996 DEHNR report and that she was not an original source of the information. Pet. App. 95a-98a.

On June 9, 2008, the Fourth Circuit reversed the district court's entry of judgment in favor of defendants. The Fourth Circuit concluded that a state or local government audit, investigation or report does not constitute a public disclosure under

31 U.S.C. § 3730(e)(4)(A). The Fourth Circuit remanded the action to the district court for a determination as to whether any portion of plaintiff's complaint had been based on a federal administrative report prepared by USDA and, if necessary, further consideration of whether defendants were entitled to summary judgment on the merits.[6]

Whether 31 U.S.C. § 3730(e)(4)(A) is limited to federal administrative audits and reports or also includes state administrative reports has divided the circuits. 528 F.3d at 296 (Pet. App. 5a-6a). The Eighth, Ninth and Eleventh Circuits have concluded that state administrative audits and reports fall within the scope of section 3730(e)(4)(A). *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917-18 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 1119 (2008); *Battle v. Bd. of Regents*, 468 F.3d 755, 762 (11th Cir. 2006); *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003). The Third and Fourth Circuits have held to the contrary. *United States ex rel. Dunleavy*

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[6] Wilson denies having had access to this USDA report. *See United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1349 (4th Cir. 1994) (unless plaintiff actually derived the allegations of her complaint from a public disclosure, plaintiff's complaint is not barred by 31 U.S.C. § 3730(e)(4)(A)). Moreover, the USDA report does not address whether the work done under this federal program was required to be sent out for bids.

v. County of Del., 123 F.3d 734, 745 (3d Cir. 1997); *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292 (4th Cir. 2008).

The Fourth Circuit expressly recognized that the literal language of the statute, 31 U.S.C. § 3730(e)(4)(A), includes state administrative audits and reports. 528 F.3d at 301 (Pet. App. 22a). Nevertheless, the Fourth Circuit concluded that congressional intent justified overriding the literal language of the False Claims Act. *Id.* (concluding that "examination of the relevant language in context" overrides Congress' literal language). Yet, in doing so, the Fourth Circuit itself concluded that the meaning of the statute is "murky" and whether Congress intended to limit the public disclosure bar to federal reports, audits and investigations is not clear. *Id.* at 305 (Pet. App. 32a). The court noted, "[a]lthough we ultimately disagree with [petitioners,] we must admit that there is some force to [their] argument." *Id.* at 303 (Pet. App. 28a).

SUMMARY OF ARGUMENT

The False Claims Act bars a *qui tam* action that is based on certain publicly disclosed information unless the *qui tam* plaintiff is an original source of that information. 31 U.S.C. § 3730(e)(4). The list of publicly disclosed information includes an "administrative . . . report, . . . audit, or

investigation." Relying on the doctrine of *noscitur a sociis* (a word is known by the company it keeps), the Fourth Circuit concluded that state and local government administrative reports, audits and investigations do not constitute an "administrative . . . report, . . . audit, or investigation." Specifically, the Fourth Circuit concluded that because the statutory list contains two uniquely federal terms ("congressional" and "Government Accounting Office"), the word "administrative" should be limited to federal administrative materials. The Fourth Circuit reached this conclusion even though the vast majority of the items in the statutory list are not uniquely federal (e.g., news media).

The word "administrative" is neither vague nor ambiguous. The term is commonly understood to refer to both state and federal administrative proceedings. Throughout the United States Code, Congress uses the word "administrative" to refer to both federal and state proceedings. Moreover, Congress has demonstrated that when it wants to distinguish between state and federal administrative proceedings, it knows how to draft language to do so. Because the meaning of the word "administrative" is clear, the Fourth Circuit erred in turning to the doctrine of *noscitur a sociis* to rewrite the meaning of this statute. *Noscitur a sociis* may only be used when a particular word or phrase is obscure or of doubtful meaning. The doctrine may not be used to create ambiguity. In drafting this statute, Congress

chose the word "administrative" rather than "federal administrative," thereby indicating its intent that both state and federal audits, investigations and reports would give rise to a public disclosure under the statute.

The doctrine of *noscitur a sociis* is premised on the assumption that Congress acts deliberately in selecting and ordering the words of the statutory list. The False Claims Act, and particularly section 3730(e)(4), stands as a particularly poor example of congressional draftsmanship. The 67 words that make up the public disclosure bar are rife with inconsistencies. Accordingly, it is inappropriate to assume that the statutory list at issue should be rewritten to create a uniform list of closely related items. In fact, it is impossible to read the list as limited to federal materials given the inclusion of "news media" among the list. *Noscitur a sociis* may only be used if there is a common feature that may be extrapolated from the statutory list. Of the seven items set out in this list, only two are uniquely federal. Because the statutory list is clearly not limited to federal materials, the court below erred in using *noscitur a sociis* to limit the plain language of a single term of this list (administrative reports, audits or investigations).

The Fourth Circuit's decision creates numerous anomalies that clearly were not intended by Congress. For example, the statute uses the phrase "administrative hearings" in two separate clauses.

The first clause of the public disclosure bar provides that a *qui tam* action may not be based on a "criminal, civil or administrative hearing." 31 U.S.C. § 3730(e)(4)(A). This clause, which contains no uniquely federal terms, has universally been construed by circuit courts, including the Fourth Circuit, to include state administrative hearings. The second clause of the statute reads as follows: "congressional, *administrative*, or Government Accounting Office report, *hearing*, audit, or investigation." *Id.* (emphasis added). Under the Fourth Circuit's decision, the phrase "administrative hearing" in the first clause has a completely different meaning than "administrative . . . hearing" in the second clause, even though the phrases are in the same sentence. Such an anomalous result flies in the face of basic principles of statutory construction.

Additionally, the Fourth Circuit's reading of the statute encourages the filing of parasitic *qui tam* actions – the very conduct that Congress sought to discourage when it enacted the public disclosure bar. Under the Fourth Circuit's decision, a plaintiff may simply copy a state administrative report verbatim into a complaint, file a *qui tam* action and then demand a bounty even though the plaintiff added nothing to an ongoing investigation. Such a result siphons off the recovery that the United States would otherwise be entitled to receive. The numerous anomalies that flow from the Fourth

Circuit's decision demonstrate that its reading of the statute is in error.

ARGUMENT

By its express terms, the False Claims Act provides that federal courts shall not have jurisdiction to hear a *qui tam* action that is based on an "administrative . . . report . . . audit, or investigation." 31 U.S.C. § 3730(e)(4)(A). The Fourth Circuit erred in using the doctrine of *noscitur a sociis* (i.e., a word is known by the company it keeps) to rewrite the language of this statute so as to limit its scope to *federal* administrative reports, audits and investigations. Congress could easily have inserted the word "federal" before "administrative," as it has done in other statutes. Congress, however, chose language with no such limitation.

The doctrine of *noscitur a sociis* is intended to prevent "ascribing to one word a meaning so broad that it is inconsistent *with its accompanying words*, thus giving unintended breadth to the Acts of Congress." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (emphasis added; internal citations omitted). The words that accompany "administrative" do not establish that the public disclosure bar, contrary to the plain text of the statute, should be read to exclude state administrative reports, audits and investigations.

Moreover, the Fourth Circuit's rewriting of the statute produces numerous anomalies that are inconsistent with congressional intent.

I. THE WORD "ADMINISTRATIVE" IS NOT AMBIGUOUS AND SHOULD NOT HAVE BEEN REWRITTEN BY THE FOURTH CIRCUIT TO MEAN "FEDERAL ADMINISTRATIVE."

The first and overriding principle of statutory construction is that "a legislature says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, when the statutory language is plain, "'the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). A federal court is not at liberty to rewrite a statute to reflect a meaning that it deems more desirable. *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 841 (2008). Rather, courts must "give effect to the text Congress enacted." *Id.*

The phrase "administrative . . . report . . . audit, or investigation" has a plain and readily understood meaning. *See, e.g.*, American Heritage Dictionary of the English Language 22 (4th ed. 2000) (definition of

noun "administration": "The activity of a government or state in the exercise of its powers and duties."). Throughout the United States Code, Congress has repeatedly used the word "administrative" to refer to both federal and state administrative proceedings.[7]

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[7] *See, e.g.*, 7 U.S.C. § 2276(b)(2)(B) (2006) (specified confidential information shall not be "used for any purpose in any action, suit, or other judicial or administrative proceeding"); 10 U.S.C. § 613a(b)(3) (2006) (deliberations of military selection boards may not be used "in any action, suit, or judicial or administrative proceeding"); 10 U.S.C. § 1102(b)(1) (2006) (restricting use of medical quality assurance reports "in any judicial or administrative proceeding"); 10 U.S.C. § 2304(c)(3) (2006) (competitive procedures need not be used to retain an expert for purposes of "any trial, hearing, or proceeding before any court, administrative tribunal, or agency"); 11 U.S.C. § 362(a)(1) (2006) (filing of bankruptcy petition constitutes an automatic stay of "a judicial, administrative, or other action or proceeding against the debtor"); 11 U.S.C. § 505(a)(2)(A) (2006) (bankruptcy court may not determine amount of debtor's tax liability if such liability has been previously adjudicated by a "judicial or administrative tribunal of competent jurisdiction"); 11 U.S.C. § 922(a)(1) (bankruptcy petition constitutes automatic stay of "a judicial, administrative, or other action or proceeding" to enforce claim against debtor); 12 U.S.C. § 1817(j)(6)(A) (2006) (requiring disclosure of "any material pending legal or administrative proceedings"); 13 U.S.C. § 9(a) (2006) (confidential census reports may not be "used for any purpose in any action, suit, or other judicial or

In fact, the False Claims Act itself (in a provision separate and distinct from the public disclosure bar

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administrative proceeding"); 15 U.S.C. § 37b(c) (2006) (congressional declaration that medical resident matching programs do not violate state and federal antitrust laws "shall apply to all judicial and administrative actions or other proceedings" pending on date of enactment); 15 U.S.C. § 2055(e)(2) (2006) (specified reports shall not be subject to subpoena or discovery "in any civil action in a State or Federal court or in any administrative proceeding"); 49 U.S.C. § 20107(c)(3)(A) (2006) (intercepts of railroad radio communications "shall not be admitted into evidence in any administrative or judicial proceeding," except for impeachment or in state and federal felony prosecutions); 50 U.S.C. app. § 502(2) (2006) (purpose of Service Members Relief Act is to "provide for the temporary suspension of judicial and administrative proceedings").

In these statutes, Congress uses the word "administrative" to include both state and federal administrative proceedings. For example, in the preamble to the Service Members Relief Act, Congress notes that the Act provides for suspension of "administrative proceedings." 50 U.S.C. app. § 502(2). The body of the Act, however, expressly provides for suspension of state and federal administrative proceedings. 50 U.S.C. app. § 512(a), (b) (2006). Similarly, when Congress uses the phrase "administrative . . . proceeding" in the automatic stay provisions of the bankruptcy code, that phrase clearly encompasses state administrative proceedings. *Contractors' License Bd. v. Dunbar (In re Dunbar)*, 245 F.3d 1058, 1063 (9th Cir. 2001).

at issue in this appeal) uses the word "administrative" to refer to both state and federal administrative proceedings. 31 U.S.C. § 3733(*l*)(7) (2006). With the 1986 amendments to the False Claims Act, Congress added a significant tool to the Government's arsenal in fighting fraud – the ability of the Department of Justice ("DOJ") to issue civil investigative demands. 31 U.S.C.S. § 3733 (LexisNexis 2009). This section allows DOJ to obtain discovery materials produced in other actions (referred to as "product of discovery") and sets specific procedures with respect to such an investigative demand. 31 U.S.C.S. § 3733(a) (LexisNexis 2009). The statute defines "product of discovery" as depositions, interrogatories and requests for admissions obtained through discovery "in any judicial or *administrative proceeding* of an adversarial nature." 31 U.S.C. § 3733(*l*)(7) (emphasis added). Given Congress' desire that DOJ have broad access to information through civil investigative demands, Congress clearly intended the word "administrative proceeding" to include both state and federal proceedings. In contrast to the numerous examples of Congress using the word "administrative" to mean state and federal administrative proceedings, when Congress wants to distinguish between a state administrative agency

and a federal administrative agency, it knows how to use language to achieve this result.[8]

Consistent with the numerous statutes in which Congress has used "administrative" to include state administrative proceedings, the Fourth Circuit conceded that "there is nothing inherently federal about the word 'administrative.'" 528 F.3d at 302. As the Fourth Circuit recognized, the public disclosure bar "by its express terms does not limit its reach to federal administrative reports or investigations." 528 F.3d at 301.

Having chosen the word "administrative" rather than the phrase "federal administrative," Congress, through the plain language of the statute, has expressed its intent that both state and federal audits, investigations and reports give rise to a public disclosure under 31 U.S.C. § 3730(e)(4)(A). The Fourth Circuit erred in turning to the obscure doctrine of *noscitur a sociis* to override the plain language of the statute.

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[8] *See, e.g.*, 6 U.S.C. § 575(b)(1)(G) (2006) ("State Administrative Agencies"); 15 U.S.C. § 717n(c)(2) (2006) ("a Federal or State administrative agency"); 15 U.S.C. § 717n(d) (2006) ("a Federal administrative agency"); 16 U.S.C. § 1466 (2006)("any Federal administrative agency"); 16 U.S.C. § 3117(a) ("any State or Federal (as appropriate) administrative remedies"); 20 U.S.C. § 956(f) (2006) ("State administrative agency"); 28 U.S.C. § 1342 (2006) ("a State administrative agency"); 42 U.S.C. § 3789d(c)(2)(A)(i) (2006) ("a Federal or State administrative agency").

II. THE FOURTH CIRCUIT ERRED IN RELYING ON THE DOCTRINE OF *NOSCITUR A SOCIIS* AS A BASIS FOR REWRITING THE STATUTE.

Relying on the doctrine of *noscitur a sociis*, the Fourth Circuit concluded that the public disclosure bar should be read as limited to federal administrative reports, audits and investigations. The Fourth Circuit erred in its application of this doctrine of statutory construction. First, the doctrine may be used only when the language of the statute is ambiguous. Second, the doctrine assumes that Congress acted deliberately and methodically in preparing the statutory list at issue. The doctrine is of limited value when, as here, Congress has not given careful consideration to either its word choice or the order of the listing. Third, the doctrine is only applicable when a common feature may be extrapolated from the statutory list.

1. The doctrine of *noscitur a sociis* may not be used to create ambiguity. It may only be used to remove doubt. *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923). The doctrine should be employed only when a "particular word is obscure or of doubtful meaning." *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893); *see also* Norman J. Singer, *Statutes and Statutory Construction* § 47:16, at 347 (7th ed. 2007) (doctrine is "a mere guide to legislative intent" and "will not be applied

where there is no ambiguity"); *see also* Francis J. McCaffrey, *Statutory Construction* 41 (1953) ("If the intent of the legislature is plain, the maxim *noscitur a sociis* must give way."); Earl T. Crawford, *The Construction of Statutes* § 190, at 326 (1940) (doctrine is to be used "only as an instrumentality for determining the intent of the legislature where it is in doubt").

The word "administrative" is neither obscure nor of doubtful meaning. As set forth above, the dictionary definition of this word includes both state and federal government. Congress has repeatedly used the word "administrative" to include both state and federal government. The Fourth Circuit therefore wrongly used the doctrine of *noscitur a sociis* not to remove doubt but to create it.

2. The doctrine of *noscitur a sociis* is based on the assumption that Congress acts deliberately in selecting and ordering the words of the statutory list at issue. Accordingly, the doctrine is of limited use when Congress has not given careful consideration to either its word choice or the order of the listing. As the circuit courts have repeatedly noted, the public disclosure bar, 31 U.S.C. § 3730(e)(4), is the poster child of poor congressional draftsmanship. *See Graham County*, 528 F.3d at 305; *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 681 (D.C. Cir. 1997).

As Justice (then Judge) Alito noted in *United States ex rel. Mistick v. Housing Authority*, 186 F.3d

376, 387 (3d Cir. 1999), section 3730(e)(4)(A) refers to the General Accounting Office[9] as the "*Government* Accounting Office" and "thus misnames an instrumentality that Congress has consistently viewed as its own." The section makes awkward use of prepositions in its reference to "the public disclosure . . . *from* the news media." *Id.* The section refers to criminal and civil "hearings," even though Congress unquestionably intended to capture trials, not just hearings. *Id.* The section states that no court shall have jurisdiction "over an action . . . based on a public disclosure," thus ignoring the fact that false claim actions frequently have multiple claims, only some of which are based on a public disclosure. *Id.* The statute fails to explain what Congress intended by the term "based on" or the degree to which an action must be "based on" the public disclosure. *Id.* While section 3730(e)(4)(A) speaks in terms of "allegations or transactions," the word "transactions" is mysteriously dropped from section 3730(e)(4)(B). 186 F.3d at 388. "The inescapable conclusion is that the *qui tam* provision does not reflect careful drafting." *Id.*

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[9] In 2004 (18 years after the 1986 amendments to the False Claims Act), Congress renamed the General Accounting Office the Government Accountability Office ("GAO"). Act of July 7, 2004, Pub. L. No. 108-271, § 8, 118 Stat. 811, 814.

In *Mistick*, the Third Circuit noted, that "[i]n light of this apparent lack of precision, we are hesitant to attach too much significance to a fine parsing of the syntax of § 3730(e)(4)(A)." *Id.* Accordingly, the doctrine of *noscitur a sociis* is a poor lens for viewing the False Claims Act. The doctrine is premised on the assumption that Congress gave careful consideration to the order of the statutory list and the relationship of the various terms. That assumption, however, does not hold true with respect to the False Claims Act.

3. The doctrine of *noscitur a sociis* applies only when a statutory listing raises an implication that the items in the list have a related meaning. *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006). "[*N*]*oscitur a sociis* is no help absent some sort of gathering with a common feature to extrapolate." *Id.* at 379-80. Here, there is no common feature that can be extrapolated from the disconnected items that Congress has placed in the statutory list. This list includes criminal and civil hearings, congressional reports and reports of the news media. Such a wide-ranging and varied list simply does not support an assertion that Congress intended (but failed to express) that the terms of this list (such as administrative reports, audits or investigations) would be limited to federal documents.

Section 3730(e)(4)(A) contains a list of seven items: 1) criminal hearings, 2) civil hearings,

3) administrative hearings, 4) congressional reports, hearings, audits and investigations, 5) administrative reports, hearings, audits and investigations, 6) "Government [sic] Accounting Office" reports, hearings, audits and investigations, and 7) news media. Of these seven items, only two are uniquely federal – congressional materials and GAO materials. None of the other five items contains language that would limit the public disclosure bar to federal materials, and one of the items (news media) could not logically be limited to federal materials. Thus, there is no common feature to extrapolate from this list.

Rather than looking at the list as a whole, the Fourth Circuit chose to focus on a subset of this list – the phrase "congressional, administrative, or Government Accounting Office report, hearing, audit or investigation." By narrowly focusing on a single clause of the statute, the Fourth Circuit reduced the number of non-federal items to one (administrative, reports, hearings, audits or investigations) as compared to two uniquely federal items. As a result, the Fourth Circuit concluded that the word "administrative" lies "'sandwiched between modifiers which are unquestionably federal in character.'" 528 F.3d at 302 (quoting *Dunleavy*, 123 F.3d at 745). The Fourth Circuit's approach, however, is the judicial equivalent of placing blinders on a horse. The Fourth Circuit ignores the fact that this clause is sandwiched between non-federal terms ("news

media" and "criminal, civil and administrative hearings").

As this Court recognized in *Gustafson*, federal courts have a "duty to construe statutes, not isolated provisions." 513 U.S. at 568. Accordingly, federal statutes "should not be read as a series of unrelated and isolated provisions." *Id.* at 570. A statutory clause should not be "viewed alone," but must be considered in light of the provisions and arrangement of the statute as a whole. *Gonzales v. Oregon*, 546 U.S. 243, 273 (2006). When the statute is read as a whole, there are simply no "clearly federal terms [that] bookend" the word "administrative." 528 F.3d at 302. Rather, the word "administrative" is simply part of a larger list that includes both federal and non-federal terms.

Like the Fourth Circuit, the United States asserts that Congress' use of the words "congressional" and "Government Accounting Office" indicates that Congress intended the clause "administrative . . . report, . . . audit, or investigation" to be limited to documents prepared by the federal government. Br. for U.S. as *Amicus Curiae* at 17 (filed May 20, 2009). The United States, however, argues that the first clause of the statute ("a criminal, civil, or administrative hearing") should also be read as limited to federal hearings. *Id.* at 17-18. Thus, the position of the United States is that even though only two of the seven items set out in section 3730(e)(4)(A) are

uniquely federal, all of the items contained in the list (except for "news media") should be limited to federal materials. The United States' position stretches the doctrine of *noscitur a sociis* beyond its breaking point and is inconsistent with this Court's long-standing principle that Congress is presumed to have meant the words that it used. *See, e.g., Dodd v. United States*, 545 U.S. 353, 357 (2005); *Conn. Nat'l Bank v. Germain*, 503 U.S. at 253-54. As a result, this argument has been soundly rejected by every circuit that has considered it. *McElmurray v. Consol. Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1252-53 (11th Cir. 2007); *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 332-33 (3d Cir. 2005); *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 174 (5th Cir. 2004); *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1244 (9th Cir. 2000); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir. 1994).

The Fourth Circuit erred in its application of the doctrine of *noscitur a sociis*. The phrase "administrative . . . report, . . . audit or investigation" is not ambiguous. Moreover, the statutory list is not restricted to federal materials. In fact, the vast majority of the items set out in the list are non-federal sources. Consequently, the doctrine of *noscitur a sociis* may not be used to alter the language that Congress chose in drafting this statute.

III. THE FOURTH CIRCUIT'S CONSTRUCTION OF THE PUBLIC DISCLOSURE BAR CREATES ANOMALOUS RESULTS THAT CONGRESS DID NOT INTEND.

The Fourth Circuit's decision construes the statute in such a way as to undermine the very purpose of the public disclosure bar and creates anomalies that could not have been intended by Congress. These anomalies further demonstrate that the Fourth Circuit erred in relying on *noscitur a sociis* as a basis to rewrite the statute.

A. The Decision Below Undermines The Purpose Of The Public Disclosure Bar.

The Fourth Circuit's decision undercuts the very purposes of the public disclosure bar. First, the Fourth Circuit's reading of the statute encourages the filing of parasitic actions by strangers who have done nothing to facilitate a fraud investigation. Second, the decision makes it less likely that true whistleblowers will be able to pursue a *qui tam* action. Third, the decision makes it less likely that States and local governments will investigate possible mismanagement of federal programs.

1. The public disclosure bar is designed to deter parasitic *qui tam* actions. *Glaser v. Wound Care*

Consultants, Inc., 570 F.3d 907, 913 (7th Cir. 2009); *In re Natural Gas Royalties ex rel. United States v. Exxon Co.*, 566 F.3d 956, 961 (10th Cir. 2009); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009); *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 507 (6th Cir. 2009). Parasitic suits add little in value and siphon off a portion of the government's recovery. *In re Natural Gas Royalties*, 566 F.3d at 960; *see* 31 U.S.C. § 3730(d).

The Fourth Circuit's construction of the public disclosure bar encourages the filing of parasitic *qui tam* actions. Under the Fourth Circuit's holding, a plaintiff may freely base his or her *qui tam* action on a report that is readily available to the public through a state or local government agency. A plaintiff can obtain these reports with virtually no effort by simply searching the Internet or serving a state FOIA request. *See* www.bsa.ca.gov/reports/agency/79 (providing access to reports of California State Auditor, including audit relied on by *qui tam* plaintiff in *Bly-Magee*, 470 F.3d at 917-18).

Under the Fourth Circuit's decision, a plaintiff could copy verbatim a state or local government report into a complaint, file the action and then demand a substantial percentage of any recovery of federal funds. Congress, however, has made clear that plaintiffs who simply rely on information that has been publicly disclosed should not be permitted

to siphon off a portion of the Government's recovery. 31 U.S.C. § 3730(e)(4)(A).

2. The decision below threatens to jeopardize the claims of true whistleblowers who are pursuing false claims investigations based on their own independent knowledge. Under the first-to-file provision of the False Claims Act, the filing of a *qui tam* action by one plaintiff cuts off all subsequently filed *qui tam* actions brought by other plaintiffs. 31 U.S.C. § 3730(b)(5) (2006). Thus, under the Fourth Circuit's opinion, an insider who has worked for years in gathering information in order to expose corruption could find his or her *qui tam* action gutted when a complete stranger to the fraud wins the race to the courthouse and files a parasitic lawsuit that is based solely on information available to the public in a state audit.

3. The practical effect of the Fourth Circuit's decision is to discourage investigations by local governments. Under the Fourth Circuit's decision, an audit or investigation by a local government may be obtained by a complete stranger to the transaction and then made the basis of a *qui tam* action against that local government. If the Fourth Circuit's decision is upheld, a substantial risk exists that a cottage industry will develop in which plaintiffs' attorneys will scour local government reports in hopes of finding self-reporting by counties and cities of errors relating to the expenditure of federal funds. Many local governments will

undoubtedly respond to this risk by choosing not to engage in such investigations. Such a result is not in the public interest. The False Claims Act should not be construed in such a way as to result in a chilling effect on such investigations.

B. The Decision Below Creates Anomalous Results That Were Not Intended By Congress.

The Fourth Circuit's construction of the statute produces several bizarre results. These anomalies demonstrate that the Fourth Circuit's reading of the statute is wrong.

1. The Fourth Circuit gave two different meanings to the word "administrative" in the same sentence. The statute expressly states that information available through "a criminal, civil, or administrative hearing" shall constitute a public disclosure. 31 U.S.C. § 3730(e)(4)(A). As set out above, every circuit that has considered whether a state "administrative hearing" can give rise to a public disclosure has concluded that such proceedings fall within the scope of 31 U.S.C. § 3730(e)(4). Under the Fourth Circuit's reading of the public disclosure bar, the phrase "administrative hearing" as it is used in the first clause of this section includes state administrative hearings. The Fourth Circuit, however, concluded that the phrase "administrative . . . hearing" as it is used in the

second clause of this section does not include state administrative hearings. Thus, the Fourth Circuit's decision ascribes completely different meanings to the same phrase even though the two phrases appear within four words of each other.[10] Not only does the Fourth Circuit's construction run afoul of the canon of statutory construction that similar or identical clauses in the same statute must be read *in pari materia*, the conclusion that the two phrases, in such close proximity, mean different things defies all logic. *See Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (under the rule of *in pari materia*, "a legislative body generally uses a particular word with a consistent meaning in a given context").

2. Congress has expressly provided that information "from the news media" will give rise to a public disclosure. 31 U.S.C. § 3730(e)(4)(A). Under the Fourth Circuit's decision, a one paragraph newspaper report in an weekly paper of limited circulation will give rise to a public disclosure while an audit conducted by an elected state official and widely disseminated will not. "To interpret the statute so narrowly would have the anomalous result of allowing public disclosure status to the most obscure local news report . . . but denying

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[10] Additionally, the Fourth Circuit's construction of the word "administrative" is inconsistent with how Congress has used that word elsewhere within the False Claims Act. 31 U.S.C. § 3733(*b*)(7).

public disclosure status to a formal public report of a state government agency." *In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117, 1144 (D. Wyo. 2006), *aff'd*, 562 F.3d 1032 (10th Cir. 2009).

The Fourth Circuit improperly assumed that simply because a report is published by the "news media," that report is much more readily available to the federal government than a state administrative report. This is simply not the case. Tens of thousands of media outlets exist in this country. The vast majority of these consist of small local radio broadcast stations, weekly newspapers and local interest magazines. Consequently, the federal government has little practical ability to retrieve, filter and use most of these news media reports.

In contrast, the States and local governments coordinate very closely with the federal government with respect to federally funded programs. *See, e.g.*, 42 U.S.C. § 1396b(a)(6)(B), (q), (r)(2)(B) (2006) (requiring States to create Medicaid Fraud Control Units which are funded in substantial part by the federal government and operate under the oversight of the Inspector General of the Department of Health and Human Services); 42 C.F.R. § 1007.17 (2008) (mandatory reporting of state Medicaid Fraud Control Units to federal government). The federal government requires detailed reporting with respect to the expenditure of federal funds. *See, e.g.*, 31 U.S.C. § 7502. The very program at issue here demonstrates this close coordination. As the district

court noted, an employee of the United States Department of Agriculture was physically present at the office of the local conservation districts and directed the day-to-day work of the districts. *See* Pet. App. 86a. The project at issue was a joint program that utilized the resources of both the federal and local government and was paid for by both.

The federal government requires States and local governments to prepare audits and reports with respect to the expenditure of federal funds, makes those reports available through a federal clearinghouse, and posts those reports on the Internet. *See* 31 U.S.C. § 7502. The Fourth Circuit's conclusion that Congress did not intend to treat such reports as public sources produces a bizarre result, particularly when the availability of these reports is contrasted with the limited circulation of the thousands of weekly papers that exist in the United States.

IV. THE POLICY ARGUMENTS SUGGESTED BY LOWER COURTS AS TO WHY THE PUBLIC DISCLOSURE BAR SHOULD NOT BE READ AS INCLUDING STATE AND LOCAL GOVERNMENT REPORTS ARE UNPERSUASIVE.

Although the majority of the circuit courts have held that state administrative reports fall within the scope of the public disclosure bar, the Third Circuit, Fourth Circuit and a handful of district courts have opined that the public disclosure bar is limited to federal administrative materials. These lower court decisions have developed three principal public policy arguments as to why the bar should be limited to federal administrative reports, audits and investigations. These public policy arguments, however, lack merit. Moreover, these arguments are insufficient to justify rewriting the words chosen by Congress. *See Ali,* 128 S. Ct. at 841 ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable.").

1. One district court has noted that the language of the public disclosure bar does not include state legislative reports – only congressional reports. *United States ex rel. Hansen v. Cargill, Inc.*, 107 F. Supp. 2d 1172, 1180 (N.D. Cal. 2000). The court concluded that it would be anomalous for Congress to bar *qui tam* actions that are based on a

state administrative report but not bar *qui tam* actions that are based on a state legislative report. *Id.*

At the time of the 1986 Amendments to the False Claims Act, a perception existed within many federal agencies that state legislatures play (or should play) virtually no role in the oversight of federally assisted programs. This perception is documented in detail in a 1980 GAO report to Congress. U.S. Gen. Accounting Office, *Federal Assistance System Should be Changed to Permit Greater Involvement by State Legislatures* (Dec. 15, 1980) (GGD-81-3). The report notes that for essentially all federal programs, Congress has assigned responsibility for the State's administration of the program to the Governor and the State executive branch, thereby "rais[ing] questions about the viability of a [state] legislative role" with respect to these programs. *Id.* at 11. The GAO notes that state legislatures have "generally been ignored" by Congress with respect to joint state and federal programs. *Id.* at 13. Although the federal government provides substantial technical and financial assistance to the state executive agencies with respect to federal assistance programs, these resources "are usually not available" to state legislatures. *Id.* at 19. Thus, the report notes, the ability of a state legislature to evaluate federal programs is "weak" compared to that of the Governor. *Id.* at 19.

Based on its interviews of various state legislators, the GAO noted that legislatures "often view involvement in [oversight of] Federal programs as an inefficient use of limited time." *Id.* at 10. According to the report, state legislative oversight of federal grant programs is "low" and "sporadic." *Id.* at 39-40. Although the report notes that several state legislatures conduct audits and program evaluations, the report does not reference a single incident of a state legislative audit revealing fraud. *Id.* at 4, 16. Rather, the focus of state legislative audits of federally funded programs, when they occur, is to "eliminat[e] unneeded or ineffective programs." *Id.* at 44. During this time period, the Advisory Commission on Intergovernmental Relations (an independent agency created by Congress) similarly expressed its concern that "state legislative bodies ha[ve] been specifically and intentionally ignored" with respect to federal programs. Carol S. Weissert, *State Legislatures and Federal Funds: An Issue of the 1980s*, 11 Publius: Journal of Federalism 67, 67 (Summer 1981). In 1980, the National Conference of State Legislatures warned that "state legislatures must be aware of traditional Congressional anxiety" with respect to state legislative oversight of federal assistance programs. National Conference of State Legislatures, *A Legislator's Guide to Oversight of Federal Funds* 27 (1980).

In light of the fact that federal assistance programs establish virtually no role for state legislatures and that Congress has ignored state legislatures with respect to these programs, it is wholly unremarkable that Congress did not include state legislative reports in the public disclosure bar when the Act was amended in 1986. As a result of the virtually non-existent legislative history with respect to this provision, one can only speculate as to the reasons Congress chose not to include state legislative reports among the list. *See* 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 4.02[A], at 4-47 to -48 (3d ed. 2006) ("Because Section 3730(e)(4) was drafted subsequent to the completion of the House and Senate Committee reports on the proposed False Claims Act Amendments, those reports, which contained discussion of altogether different bars, cannot be used in interpreting it."). Given the limited oversight role that state legislatures play with respect to federally funded programs, however, the plain language of the statute cannot be characterized as odd or producing an absurd result.

2. Both the Fourth Circuit and other federal courts have asserted that Petitioners' construction of the Act would encourage local governments to draft obscure reports that disclose wrongdoing, thereby rendering the local government immune from future *qui tam* actions. This argument, however, ignores the fact that although local governments may be

sued under the False Claims Act, States may not be sued by a *qui tam* plaintiff. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000). The Fourth Circuit's rationale therefore offers no justification for reading the public disclosure bar as excluding *state* administrative reports. Because States cannot be sued by a *qui tam* plaintiff, they would not draft reports describing their own misconduct for the sole purpose of cutting off *qui tam* actions.

Additionally, the Fourth Circuit's argument overlooks the fact that the effect of section 3730(e)(4)(A) is only to bar truly parasitic lawsuits – opportunistic plaintiffs who add no value to the fraud investigation. Under the False Claims Act, a plaintiff who is an original source of the information at issue (rather than acting as a parasite) is not barred from bringing a *qui tam* action. Additionally, the public disclosure bar does not preclude the United States from pursuing a false claim action even if the information on which that action is based is in the public domain. As a result, local governments have no incentive to create reports or audits for the sole purpose of cutting off *qui tam* actions.

3. In the decision below, the Fourth Circuit emphasized that state and local government reports are not particularly likely to come to the attention of the federal government. 528 F.3d at 306. Thus, the

Fourth Circuit concluded that state and local government reports should be excluded from the public disclosure bar. The Fourth Circuit's conclusion, however, is built upon faulty logic.

As the Fourth Circuit recognized, state administrative hearings fall within the public disclosure bar as a result of the first clause of section 3730(e)(4)(A) ("criminal, civil, or administrative hearing"). "The federal government is no less likely to obtain information from a state administrative audit than it is from a state administrative hearing." *Bly-Magee*, 470 F.3d at 918. In fact, the federal government is less likely to have access to an administrative hearing than to an administrative report. Many state administrative reports are readily available on the Internet. Those which are not available on the Internet can be readily obtained through a FOIA request.[11] In contrast, state administrative hearings frequently are not transcribed. Moreover, searching a state administrative proceeding for specific information tends to be much more difficult than simply

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[11] State FOIA requests exempt certain documents (e.g., attorney-client communications) from public disclosure. A state report that is not subject to public disclosure, of course, would not constitute a bar to a *qui tam* action. *See* 31 U.S.C. § 3730(e)(4)(A) (action must be "based upon" public disclosure).

requesting the state or local government to make available a specific report or category of reports.

Similarly, reports by the news media are not necessarily readily available to the United States Department of Justice. A substantial portion of the media outlets in the United States consists of local radio stations. *See* U.S. Gov't Accountability Office, *Media Ownership* 10 (March 2008) (number of radio stations operating in 2006 totaled 13,793). Information aired by local radio stations is generally non-searchable.[12] Once the broadcast is delivered, it is lost to all but those who heard the original broadcast. Certainly, a formal report prepared by a state auditor that is published on the Internet is much more readily available to the Department of Justice than is a fleeting radio news broadcast from Nisswa, Minnesota (Radio Station KBLB; population of 1,953). The same may be said of newspaper reports. The majority of newspapers throughout the country are not searchable through Lexis, Westlaw or similar databases. Many of these newspapers are weekly papers with circulations in the hundreds (and in some cases fewer). The Fourth Circuit's assumption that material from the news media is

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[12] Although the contents of some radio station broadcasts may be available on the Internet, this is not the industry norm. *See* www.npr.org (example of searchable broadcasts).

more readily accessible to the Department of Justice than state and local government reports is flawed.

In contrast to the difficulty of searching and tracking the millions of articles and broadcasts emanating from the thousands of media outlets throughout the country, the information contained in state and local reports, audits and investigations is, in comparison, readily available to the Department of Justice. A substantial portion of the work of state and local government involves cooperative programs with the federal government. In fact, the program at issue here, the Emergency Watershed Protection Program, is such a program with the costs being shared by the county and federal government. 16 U.S.C. § 2203; 7 C.F.R. §§ 624.1 to .11. A federal employee was physically housed at the local soil and water conservation district and directed the work by the districts. Moreover, the very report at issue was prepared as a result of the federal government's requirement that States and local governments receiving federal funds must be audited annually. 31 U.S.C. § 7502(h). Given that the report at issue was likely in the possession of the federal government, *see* J.A. 119, and was certainly within its constructive possession, an argument that the content of the report is "unlikely to come to [the federal government's] attention" is without merit. Br. for U.S. as *Amicus Curiae* at 15 (filed May 20, 2009).

When, as here, a state or local government report is prepared in connection with the operation of a joint program, the contents of that report are generally accessible to the federal government. Moreover, all fifty States have FOIA statutes. Matthew D. Bunker, *et al.*, *Access to Government-held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 Fla. St. U. L. Rev. 543, 543 (1993). As a result, state and local reports are available to both the federal government and interested citizens.

In its decision, the Fourth Circuit notes that "there is no central location (like a county courthouse with a searchable docket) where information about [administrative reports, audits or investigations] is kept and made available to the public." 528 F.3d at 306. The requirement of a searchable docket cannot be found within the text of the statute. Moreover, the Fourth Circuit ignores the very nature of state FOIA requests. Under state FOIA statutes, there is no need to travel to a county courthouse, search a docket and then retrieve the document of interest. Under state FOIA laws, one must merely request the type of document or report being sought. It is then incumbent on the state or local government to undertake the search and retrieval of that document. The Fourth Circuit's decision is based on a fundamental misunderstanding as to the ease with which state

and local government reports may be obtained through a state FOIA request.

The public policy arguments espoused by the Fourth Circuit do not justify rewriting the statute so as to change the word "administrative" to "federal administrative." The statute, as written, does not produce absurd results. The policy choice as to whether state and local government audits, reports and investigations should fall within the scope of section 3730(e)(4)(A) is best left to Congress. The language chosen by Congress should not be re-written by this Court.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be reversed.

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RESPONDENT'S BRIEF

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GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, *ET AL.*,

Petitioners,

v.

UNITED STATES *EX REL.* KAREN T. WILSON,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Fourth Circuit

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RESTATED QUESTION PRESENTED

Whether a report, audit, or investigation other than one by the federal government, such as a report by an accounting firm of its audit of a local government, can constitute a "congressional, administrative, or Government Accounting Office report, hearing, audit or investigation" within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

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STATEMENT OF THE CASE

The False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.*, prohibits false or fraudulent claims for payment to the United States. 31 U.S.C. § 3729(a). The FCA authorizes the Attorney General to bring a civil action against one who has violated the FCA. 31 U.S.C. § 3730(a). Alternatively, a private person (known as the relator) may bring a *qui tam* civil action "in the name of the Government." 31 U.S.C. § 3730(b)(1).

If a relator brings a *qui tam* action, the Government may intervene in the action and take the lead in prosecuting it. 31 U.S.C. § 3730(b)(2). If the Government intervenes, and the Government and relator are successful in obtaining a recovery for the United States, then the relator is entitled to an award between 15% and 25% of the total recovery. 31 U.S.C. § 3730(d)(1). If the United States declines to intervene, and the relator prosecutes alone and is successful in obtaining a recovery for the United States, then the relator is entitled to an award between 25% and 30% of the total recovery. 31 U.S.C. § 3730(d)(2). The FCA's "public disclosure" bar provides that:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting

> Office[1] [("GAO")] report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4).

Beginning in 1995, Graham and Cherokee counties in North Carolina participated in the federal Emergency Watershed Protection (EWP) Program, which provided funding for the clean-up and repair of damage caused by flooding. Pursuant to the EWP Program, each county entered into an agreement with National Resources Conservation Service (NRCS), an agency of the United States Department of Agriculture (USDA). Under their respective agreements, the two counties agreed to perform remediation work for which they would receive federal funds. The counties then delegated that work to their respective soil and water conservation districts — petitioners Graham County

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[1] Both the compilers of the United States Code and the courts have construed this term to refer to the General Accounting Office (now renamed the Government Accountability Office). See 31 U.S.C. § 3730 n.2. Pet. App. 19a n.4; *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 382 (3rd Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000).

Soil & Water Conservation District ("Graham District") and Cherokee County Soil & Water Conservation District ("Cherokee District"). Pet. App. 7a-8a.

Petitioner Richard Greene, then an NRCS employee, functioned as the federal government representative and an inspector for the counties' EWP programs. Green was assisted by another federal employee, William Timpson. *Id. at* 8a. For several years up through 1993, while Greene served as an NRCS employee, Greene directed his wife's company to sell materials to Graham District and Cherokee District, and to pay annual kickbacks directly to the employees of the two districts. *Id. at* 102a.

At the suggestion of Greene, Cherokee District awarded, without any bidding, EWP Program work to Greene's friend Billy Brown. *Id.* at 9a. Greene then funded Brown's purchases of supplies for the EWP work and subsequently received payments of cash back from Brown. Greene inspected and signed off for payment of the EWP work performed by Brown.[2] *Id.* at 137a-38a.

EWP work was normally accomplished by employees of the EWP Program contract party, who received their normal salary while performing the work. *Id.* at 57a. However, Graham District arranged for one of its employees, petitioner Keith Orr, to do, and be paid for, EWP Program work as an "independent" contractor in addition to being paid a

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[2] Richard Greene was subsequently convicted in federal district court for misappropriating the proceeds of logs and other misconduct. Pet. App. 10a, at n 2.

salary for his full-time work as a District employee. *Id.* at 9a. There was no bidding, nor any written contract, for this arrangement. D.E. 256-10[3]. Graham County subsequently admitted that Orr's performance of the work as an independent contractor violated the conflict of interest rules of the EWP Program. D.E. 256-16. Greene personally funded Orr's purchases of supplies for the EWP work, assisted Orr in its performance, and then certified that all of Orr's EWP work met the requirements of the EWP Program.[4] Pet. App. 137a-38a.

Respondent Karen Wilson was the secretary of Graham District from 1993 to Spring 1997. D.E. 184, 5;16. Wilson became troubled by Orr's work for the EWP Program and the arrangements between Greene, Orr, Brown and Timpson, particularly after Orr told Wilson that Green, Brown, Orr, and Timpson divided the proceeds of the EWP contract. Pet. App. 10a. In the summer of 1995, Wilson raised her concerns with various county and conservation district officials. *Id.* She voiced her concerns to two NRCS employees in November 1995 and again in a December 1995 letter to NRCS officials. *Id.* A federal agent interviewed Wilson in November 1996 about the EWP Program. *Id.*

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[3] D.E. refers to the docket entry number of the document when it was filed in the district court below.

[4] On July 12, 1996, the Graham County Finance Officer issued one of the EWP Program checks to Orr with a notarized statement that she was issuing it "under duress and against [her] will and better judgment." JA 117-18.

According to Wilson, in retaliation for her whistleblowing, her employer, petitioner Graham District, and her co-workers harassed her, over the course of a year until it culminated in her constructive discharge. JA 26-32. The harassment included obscene and hostile gesturing, leaving a gun cylinder on her desk, ostracizing her, and threatening to eliminate her position, attack her violently, and kill her husband. *Id.*

On January 25, 2001, Wilson filed an FCA *qui tam* action alleging, *inter alia*, that the Petitioners submitted or caused to be submitted false claims to the Government for benefits under the EWP Program.[5] Pet. App. 11a-12a. Respondent alleged that a conspiracy existed between Greene, Orr, Timpson, and Brown. *Id.* Greene funneled Graham County and Cherokee County EWP work to Brown and Orr, and then Greene and Timpson inspected the work and approved the bills for payment. *Id.* Then, the money was paid to Orr and Brown under the EWP contracts and shared among the co-conspirators. *Id.*

Wilson also alleged that the claims based on the EWP payments to Brown and Orr were false and fraudulent because the counties failed to seek bids

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[5] Wilson also asserted a retaliation claim under section 3730(h) of the FCA. D.E. 1.

The court of appeals dismissed the retaliation claim as time-barred on remand from this Court's decision in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005)(FCA six-year statute of limitations does not apply to retaliation claims under § 3730(h); court should apply most closely analogous state statute of limitations).

before awarding the EWP work to Orr and Brown; and Graham County's use of Orr as an "independent" contractor violated the EWP Program's conflict of interest rules. *Id.*

On March 13, 2007, the district court granted summary judgment in favor of the defendants based on its conclusion that subject-matter jurisdiction was precluded by the FCA's public disclosure bar. Pet. App. 105a. In support of its ruling, the district court found *sua sponte* that two documents constituted applicable public disclosures: 1) a March 1996 audit report prepared by a private firm of certified public accountants (CPAs), Crisp & Hughes, LLP, of Sylvia, North Carolina (CPA Report); and 2) a May 1996 North Carolina Department of Environment, Health and Natural Resources report (May 1996 DEHNR Report).[6] Pet. App. 96a-98a.

Crisp & Hughes sent the CPA Report, with a cover letter, to Sharon Holloway, the finance officer of petitioner Graham County. JA 119. The cover

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[6] The May 1996 DEHNR Report itself is not in the record. In its decision, the district court noted that the May 1996 DEHNR report concerned "the North Carolina Agricultural Cost Sharing Program [NC Ag Cost Sharing Program] and the involvement of [petitioners] Greene, Timpson [and] Billy Brown ... with improprieties in connection with that program." Pet. App. 97a. While Wilson's original complaint contained allegations regarding the NC Ag Cost Sharing Program, those allegations were dropped from the Third Amended Complaint, JA 9-35, the operative complaint. Thus, as the district court noted in its discussion of the "public disclosure" bar, the NC Ag Cost Sharing Program allegations were "outside the scope of the [third amended] complaint." Pet. App. 87a-88a, 97a-98a. Petitioners' Brief refers to the May 1996 DEHNR Report only briefly and vaguely, and without any citation to the record. Pet. Br. 9 n.4.

letter stated that copies of the CPA Report were sent only to Ms. Holloway, the "Local Government Commission" and to the North Carolina Division of Soil and Water Conservation. *Id.*

Crisp & Hughes addressed the CPA Report itself solely to the Board of Commissioners of Graham County. Pet. App. 95a. The report contains only the results of those procedures performed by Crisp & Hughes that were "agreed to by Graham County." *Id.* Those procedures "were performed solely to assist you [Graham County Board of Commissioners] in determining that the books and records of Graham County have been adequately maintained." *Id.* The CPA Report was "intended solely for your [the Graham County Board of Commissioner's] information." JA 121.

The CPA Report addressed two of Graham County's projects under the EWP Program. The report noted various exceptions: missing documentation, "minor clerical reporting errors," and a total of $192 in calculation errors. JA 124-26. It also noted that

> Certain portions of the project were completed by an individual who was an approved project inspector. This appears to be a violation of the County's code of conduct which was submitted in certifications as prerequisite to establishing project agreements with the USDA.

JA 126. And it also stated that

> G.S. 143-131 requires contracts for construction or repairs costing from $5,000 to $50,000 be awarded in accordance with an informal bidding process. The statute requires that a record of all such bids be kept. No documentation was available to indicate that informal bid requirements had been complied with.

Id.

The court of appeals vacated and remanded. Pet. App. 1a-46a. The court noted that there was a split in the circuits on the issue of whether the phrase "congressional, administrative, or [GAO] report, hearing, audit or investigation" encompasses an administrative report issued by a State or county. *Id.* at 18a-21a. The court of appeals agreed with the Third Circuit that the phrase encompasses only *federal* audits, reports, hearings and investigations. Pet. App. 22a-37a. It noted that the terms "congressional" and GAO refer to "clearly *federal* sources." *Id.* at 23a-24a. The court concluded, that, for purposes of the public disclosure bar, "[t]he placement of 'administrative' squarely in the middle of a list of obviously federal sources strongly suggests that 'administrative' should likewise be restricted to *federal* administrative reports, hearings, audits, or investigations." *Id.* at 23a-24a. The court of appeals further found that the relevant legislative history supported its interpretation. Pet. 34a-35a. Accordingly, the court of appeals held that neither the CPA Report nor the State report fell within the scope of the "public disclosure" bar. Pet. App. 37a.

SUMMARY OF ARGUMENT

The FCA's jurisdictional bar against a *qui tam* action set forth in Section 3730(e)(4) can be triggered by public disclosures "in a criminal, civil or administrative hearing, in a congressional, administrative, or [GAO] report, hearing, audit, or investigation, or from the news media." The Fourth Circuit below properly construed the language "administrative . . . report . . . audit or investigation" as referring to reports, audits, or investigations of the federal government, and as not encompassing those of state or local governments (or private entities for that matter).

"Administrative" is susceptible to several different meanings. The most common meaning addresses the management of a government, business or institution. All those organizations generate administrative reports, audits, and investigations that could contain disclosures of fraud against the government.

In construing the language, the Fourth Circuit read it in context and observed that Congress had placed the public disclosure sources into three groups, or categories. The language at issue fell in Category 2 — "a congressional, administrative, or [GAO] report, hearing, audit or investigation." Noting that the modifier "administrative" was sandwiched between the other two modifiers in Category 2 — "congressional" and GAO that unambiguously refer to the federal government, the Fourth Circuit properly employed the common sense maxim of *noscitur a sociis* to limit the meaning of "administrative" so as to make it consistent with those of the two surrounding terms. Consequently, it properly

construed the language as referring to only *federal* administrative reports, audits and investigations, and as not encompassing those from other sources such as state or local governments. In other words, "administrative" was construed in context.

The Fourth Circuit's construction is supported by the exclusively federal focus of the FCA's overall scheme and structure. The FCA provides tools for the federal government to investigate false claims made against it, and, with the possible assistance of private persons, to obtain a recovery. The FCA has only two categories of persons who may bring FCA actions: the federal government, and "private persons." To the extent that state or local governments may enforce the FCA, they must do so by bringing *qui tam* actions as "private persons" in exactly the same way individuals must.

Construing Category 2 as limited to exclusively federal proceedings conforms to the history and purposes of the FCA. In 1943, Congress amended the FCA to bar *qui tam* actions that were based on evidence or information that the Government had when suit was filed. This so-called "government-knowledge" bar had the broad effect of precluding *qui tam* actions where the federal government merely possessed the evidence or information, even if there was no indication that it had done, or was going to do, anything with it. Congress eventually concluded that the "government knowledge" bar was too restrictive. With the 1986 Amendments to the FCA, Congress replaced the "government knowledge" bar with the more narrow "public disclosure" bar. Under the "public disclosure" bar, a *qui tam* lawsuit is barred only where the alleged

fraud has been publicly disclosed in the course of the federal government taking actions, e.g., auditing, investigating, reporting, that indicate that the Government is actually "on the trail of the fraud," or likely will be as a result of the exposure of the fraud to the general public (and the Government) by the news media.

The drafting history of the 1986 Amendments demonstrates that Congress, during the entire process, understood the bars to *qui tam* actions as being potentially triggered only by disclosures from federal governmental sources or the news media. After the Senate bill had been amended so that the first paragraph of the "public disclosure" bar contained language identical to 31 U.S.C. § 3730(e)(4)(A), the interplay between that paragraph and the bill's "original source" provision, which contained the phrase "Government or the news media," made clear Congress' understanding that the sources set forth in the paragraph consisted of components of the Government, i.e., federal government, and the news media. The bill's primary sponsor, Senator Grassley, confirmed that understanding at the time the bill was passed.

The exclusively federal meaning of "administrative" in Category 2 of the "public disclosure" bar is further supported by the Senate's addition of the terms "administrative" and " audit or investigation" to Category 2 as part of a package of comprehensive antifraud legislation. That legislation included both the 1986 FCA Amendments, and Senate bill S. 1334, the Program Fraud Civil Penalties Act, which dramatically expanded the scope of federal administrative investigations and

proceedings to fight false and fraudulent claims against the Government.

Congress' clear purpose for the 1986 Amendments was to encourage the filing of more *qui tam* suits, including suits based on information already in the federal government's possession. This was accomplished by replacing the government knowledge bar, which was triggered by mere federal *possession* of fraud information, with one triggered by the federal *pursuit* of the fraud.

State and local government reports are by definition not the result of activities of the federal government. Thus, the mere possession of them by the federal government gives no indication that the government is pursuing the fraud. Under Petitioners' construction, state and local government reports would constitute potential bar-triggering sources of disclosures simply because the federal government had potential access to them. The effect of the Petitioners' construction would be a return to, and even an expansion of, the discarded "government knowledge" standard. In addition, the Petitioners' construction would have the troubling consequence of permitting a local government, when it is both the source of the purported disclosure and a potential defendant in a *qui tam* action, to create practical immunity under the FCA. Petitioners' construction would frustrate the purposes of the 1986 FCA Amendments by expanding, rather than reducing, the jurisdictional bar, and thereby reduce, rather than increase the number of *qui tam* suits. This obviously was not intended by Congress. Conversely, the Fourth Circuit's construction furthers the purposes of the 1986 Amendments.

ARGUMENT

The court of appeals correctly construed the FCA's "public disclosure" bar as not encompassing disclosures from state and local government administrative reports.

I. The Fourth Circuit Properly Construed "Congressional, Administrative, Or [GAO] Report, Hearing Audit, Or Investigation" In Section 3730(e)(4)(A) Of The FCA As Not Encompassing State And Local Proceedings.

A. When Read In Context, "Administrative . . . Report [Or] Audit" Refers To Only A *Federal* Administrative Report And Audit.

The FCA places the sources of public disclosures that can trigger the jurisdictional bar into three groups, or categories:

1) "a criminal, civil or administrative hearing;"

2) "a congressional, administrative, or [GAO] report, hearing, audit, or investigation;" and

3) "the news media."

§ 3730(e)(4)(A). As demonstrated herein, the court of appeals properly construed category 2 as limited to disclosures made in a *federal* report, hearing, audit or investigation.

"Statutory language has meaning only in context." *Graham County Soil & Water Cons. Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415

(2005); *see also Jones v. United States*, 527 U.S. 373, 389 (1999)("Statutory language must be read in context and a phrase 'gathers meaning from the words around it.'"). "The word 'administrative' is capable of many meanings." *United States ex rel. Dunleavy v. County of Del.*, 123 F.3d. 734, 745 (3d Cir. 1997); *see also Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 103 n.8 (1970) (Harlan, concurring)("'administrative' . . . may in various contexts, bear a range of related meanings.") In fact, perhaps the most common usage of "administrative" is one not limited to government. Administrative is the adjective form of "administration," which is defined as "[t]he management or performance of the executive duties of a government, institution, or business." Black's Law Dictionary (8th ed. 2004)(first definition). Institutions of every stripe are "administered" by their "administrations" and take "administrative" action, e.g., schools, businesses, charitable organizations, sports leagues, political parties, and religious organizations. One may study business administration, work as an administrative assistant, or follow administrative policy at work or school.

"In context, however, those meanings are narrowed by the commonsense canon of *noscitur a sociis* — which counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008). When one reads "administrative" in context, "the exclusively federal nature of the terms 'congressional' and '[General] Accounting Office' is immediately apparent, and these clearly federal terms bookend the not-so-clearly federal term." Pet. App. 24a. It is unlikely

that Congress "intended the word 'administrative' to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character." *United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 745 (3d Cir. 1997); *see also Third Nat'l Bank v. Impac, Ltd.*, 432 U.S. 312, 322 (1977)(term in statutory provision that was "sandwiched" between two other terms should be given a meaning consistent with those other two terms).

The use by paragraph § 3730(e)(4)(A) of the term "congressional," rather than the broader term "legislative," clearly indicates Congress' intent that the only legislative reports or investigations potentially triggering the public disclosure bar be those of the federal legislature — Congress. Consequently, reports and investigations of a state or county legislature are excluded from the bar's scope. It is therefore unlikely that Congress intended to treat other state or county "administrative" reports or investigations any differently, particularly in the case of counties, which are typically governed by an elected body that exercises both the legislative and administrative powers of county government.[7]

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[7] For example, in North Carolina, all the powers, both legislative and administrative, of county government are invested in the board of commissioners. See N.C. Gen. Stat.153A-12. When the Board passes an ordinance, it is acting in its capacity as the county's legislative body. *See Jackson v. Guilford County Bd. Of Adjustment*, 166 S.E.2d 78, 83 (N.C. 1969).

Thus, construing "administrative" in Category 2 so that it includes state and local government reports, audits and investigations would improperly broaden its meaning, rendering it inconsistent with the other two clearly federal modifiers. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (applying the maxim of *noscitur a sociis*, the Court should "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words"). Restricting the meaning of "administrative" to *federal* administrative so that it is consistent with the two other federal modifiers in Category 2 properly avoids giving unintended breadth to the "public disclosure" bar. *See Jarecki v. G.D. Searle*, 367 U.S. 303, 307 (1961)("maxim *noscitur a sociis* . . . is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress"). Accordingly, as the court of appeals correctly held, Category 2 is properly construed as limited to disclosures in a *federal* report, hearing, audit or investigation. *See* Pet. App. 37a; *Dunleavy*, 123 F.3d at 745.

The court of appeals' construction is reinforced by the appearance that Congress' placement of the disclosure sources into the three groups or categories was neither random nor haphazard. Instead, Congress categorized the sources by type of activity. Essentially, Category 1 consists of adjudicative proceedings, while Category 2 consists of legislative or oversight activities. Category 3, containing only "news media," is distinct from the other two categories as non-governmental.

The term "administrative hearing," although it appears in both Category 1 and 2, nonetheless fits into this scheme. "It is unlikely that Congress would have referenced administrative hearings twice in the same sentence, unless it intended to allude to different contexts." *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1245 (9th Cir. 2000). It would be redundant. Thus, the Court should construe the two terms differently, if there is a reasonable construction that does so. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). And there is.

While "[t]he term 'hearing' in its legal context undoubtedly has a host of meanings," *United States v. Fla. E. Coast Railway Co.*, 410 U.S. 224, 239 (1973), the federal Administrative Procedures Act (APA), 5 U.S.C. § 551 *et seq.*, requires that an administrative hearing be either adjudicative or rule-making, never both. *Association of Nat'l Advertisers, Inc., v. FTC*, 627 F.2d 1151, 1160 (D.C. Cir. 1979)("Administrative action pursuant to the APA is either adjudication or rule-making.") Thus, using the APA's dichotomy, and applying the construction canon of *noscitur a sociis*, "administrative hearing" in Category 1 must refer to an adjudicative hearing, while in Category 2 it must refer to a rule-making hearing, which is "quasi-legislative" in nature. This construction avoids rendering one of the "administrative hearing" references redundant or vague by giving distinct, yet complementary meanings to both. Together, they exhaust the range of possibilities under the APA.

This coherent categorization of the public disclosure sources by Congress further supports the weight given by the Fourth Circuit to the grouping of those sources in its construction of the "administrative" sources in Category 2. Furthermore, the fact that the public disclosure sources can be construed coherently and without redundancy only by applying the federal APA's scheme for administrative action also supports the construction itself – that the sources in Category 2, including the "administrative" ones, are exclusively federal.

B. The Fourth Circuit's Construction Is Consistent With, And Supported By The Exclusively Federal Orientation Of The FCA's Overall Scheme And Structure.

The Fourth Circuit construction of the sources in Category 2 as exclusively federal is consistent with, and supported by the federal orientation of the FCA's overall structure and scheme. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme."(citation and internal quotation omitted)). The FCA gives tools to the federal government to investigate fraud against it, and, with the help of private persons, to recover the funds of which it was defrauded.

The exclusively federal focus of the FCA's governmental references is demonstrated by the FCA's repeated use of the term "Government." *E.g.*, 31 U.S.C. § 3729(a)(1); *id.* at § 3730(b)(1). Although "Government is undefined, the FCA uses it

interchangeably with "United States Government" throughout sections 3729 and 3731 of the FCA to refer to only the federal government. *See, e.g.*, 31 U.S.C. §§ 3729(a)(1)&(3).

The FCA references to *governmental* actions are likewise exclusively to those of the federal government. The FCA refers repeatedly to the *federal* government investigating and prosecuting fraud against the United States both pursuant to, and in parallel to, the FCA, e.g., "[t]he Attorney General diligently shall investigate a violation under section 3729," 31 U.S.C. § 3730(a); "the Government's investigation or prosecution of a criminal or civil matter arising out of the same fact," *id.* at § 3730(c)(4); "the Government may elect to pursue its claim through any alternate remedy available to the Government," *id.* at § 3730(c)(5); "a civil suit or an administrative civil money penalty proceeding in which the Government is already a party," *id.* at § 3730(e)(3); "a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements," *id.* at § 3731(d).

To the extent that state and local governments may bring an FCA action, they must do so as "private person[s]." *See* 31 U.S.C. § 3730(b)(1). This is in juxtaposition to the federal government, which is uniquely authorized to bring a governmental FCA action through the Attorney General, *id.* at § 3730(a), and to intervene and take over any *qui tam* action, including any that might be brought by a state or local government, *id.* at § 3730(B)(4)(A). If a state or local government were to bring an FCA action, like any other "private person[]," it is

required to bring it "in the name of the [federal] Government." *Id.* at § 3730(b)(1). Thus, in the detection and prosecution of fraud, the FCA puts state and local governments on par with private individuals, and accords them, unlike the federal government, no special status.

Therefore, the Act's exclusive focus on *federal* governmental actions reinforces the conclusion that FCA references to governmental instrumentalities of fraud investigation and prosecution, like those in the "public disclosure" bar, are references to those of *federal* government.

C. Petitioners' Construction Is Improperly Based On The Meaning Of Words Divorced From Their Context.

The Petitioners' primary argument against the court of appeals' construction is that the word "administrative," considered in isolation, is unambiguous and has only one meaning: "[t]he activity of a government or state in the exercise of its powers and duties." Pet. Br. 17-18. As an initial point, the argument fails because it violates the "fundamental principal of statutory construction (and of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993); *see also King v. St. Vincent's Hosp*, 502 U.S. 215, 221 (1991)("the meaning of statutory language, plain or not, depends on context").

Moreover, as shown supra. 14, it also fails because "administrative" has at least one additional meaning in common usage at odds with their

suggested construction. While Petitioners hedge their position by also asserting that the phrase "administrative . . . report . . . audit, or investigation" has a plain and readily understood meaning, Pet. Br. 17-18, this fails to improve their position because private entities do all of these things, including holding "hearings[s]," the activity that Petitioners left out of their phrase. And, of course, the ellipses in their phrase show that it is not the actual statutory language but an edited version of it.

Contrary to Petitioners' argument, one must look at "administrative" in context even to restrict its meaning so as to exclude private activities. [8] Likewise, the same contextual analysis necessary to restrict its application to governmental activities – its syntactic relationship to congressional and GAO, also supports restricting its meaning to that of the *federal* government.

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[8] Petitioners' citations to other sections of the Code to establish that "administrative" has one fixed meaning regardless of the context is unavailing. The Code uses "administrative" also to refer to explicitly private entities. *E.g.*, 7 U.S.C. § 6614(b)&(c). Further, almost all of Petitioners' cites are to the phrase "administrative proceeding," which does not occur in 31 U.S.C. § 3730(e)(4). They can only point to a single instance of "administrative" elsewhere in the FCA that they claim supports their position. Pet. Br. 20-21 (citing 31 U.S.C. § 3733(l)(7)). However, like almost all of their other citations, "administrative" in that section is part of the phrase "administrative proceeding." *See* 31 U.S.C. § 3733(l)(7). More importantly, it is located in a context that is significantly different from that of "administrative" in 31 U.S.C. § 3730(e)(4)(A). It is in the section dealing with the powers of the Attorney General to issue a civil investigative demand, and not in the sections governing *qui tam* actions.

Petitioners also suggest that Congress was so sloppy in drafting the "public disclosure" bar that any attempt to ascertain its meaning through a fine parsing of its language is futile, and that well-established tools of statutory construction, like *noscitur a sociis,* are thereby rendered useless. Pet. Br. 14. The Court has elsewhere rejected Petitioners' defeatist approach to construing the "public disclosure" bar; and instead has reached conclusions about the meaning of the provision based on the nuances and interplay of various phrases in the text. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 471 (2007) (construing paragraph (B) of the FCA's "public disclosure" bar in light of the precise interplay of terms in that paragraph with those in paragraph (A)). In any case, Petitioners' contention that Congress' draftsmanship was so poor that the context of the words in the statute offer no clues to their meaning cannot be reconciled with their contention that the provisions of the statute are so plain and clear that their meaning can be derived by merely consulting the dictionary for the definitions of the individual words.

Petitioners argue that, to the extent context is relevant, the FCA's grouping of the disclosure sources should be ignored, and the sources analyzed as if they consisted of a laundry list of seven items. They then conclude that "there is no common feature to extrapolate from this list" that might shed light on its meaning. Pet. Br. 25-26. This crude approach falls short because it fails to use ordinary and accepted contextual cues included in the text as it was actually drafted by Congress. As noted, supra 16-18, one can detect an internal logic to Congress'

grouping of the disclosure sources into three different categories.

Even if one were to apply the maxim of *noscitur a scoiis* to the entire list of disclosures, one should reach the same conclusion. Just as the meaning of Category 2's general term "administrative" is properly informed and limited by the other explicitly federal terms located within Category 2, the meaning of the terms in Category 1 should be construed in light of Category 2's federal nature, as well as the federal orientation of the statute overall. As the United States demonstrated in its amicus curiae brief at the petition stage, all of the governmental disclosure sources should be construed as exclusively federal, including those in Category 1. U.S. Amicus Pet. Br. 6. Furthermore, this construction is also supported by the history and purposes of the FCA, see infra 24-33.

Petitioners contend erroneously that the Third, Fourth, Fifth, Ninth and Eleventh Circuits have "soundly rejected" construing Category 1as limited to *federal* criminal, civil and administrative hearings. Pet. Br. 28. To the contrary, as the court of appeals observed, "only one court thus far has explicitly addressed the possibility that [Category 1] should be limited to federal hearings." Pet. App. 28a. (citing *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1244 (9th Cir. 2000)).[9] And that one court

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[9] *See United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 332-33 (3rd Cir. 2005)(argument that Category 1 was limited to federal proceedings was neither addressed, nor apparently, even raised); *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 174 (5th Cir. 2004)(same); *McElmurray v. Consol. Gov't of Augusta-*

supported its holding that Category 1 is not limited to federal proceedings with its contention that it avoided rendering the reference to "administrative hearings" in Category 2 redundant, under the assumption that "administrative" in Category 2 was properly construed as exclusively federal. *See* 202 F.3d at 1244. That rationale for the holding is undermined by the more satisfying construction providing that the first reference is to adjudicative administrative hearings, while the second reference is to rule-making administrative hearings, see supra, 17. While not necessary to resolve the question presented in this appeal, the better analysis holds that Category 1 is limited to federal proceedings as well.

II. The History And Purposes Of The Act Support The Fourth Circuit's Construction.

The FCA, and its "public disclosure" bar, should be construed "in light of the evident legislative purpose in enacting the law in question." *United States v. Bornstein*, 423 U.S. 303, 310 (1976). Construing "administrative . . . report . . . audit, or investigation," and, indeed, all of the governmental sources of disclosure in the "public disclosure" bar as exclusively federal furthers the purposes of the FCA and the 1986 Amendments to it. Conversely, construing those governmental sources as

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Richmond County, 501 F.3d 1244, 1252-53 (11th Cir. 2007)(same); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir. 1994)(court addressed and rejected with little discussion related, yet different, argument that "civil hearing" be read "as only encompassing hearings in civil cases in which the Government is a party").

encompassing state and local governments frustrates those purposes.

A. Construing "Administrative . . . Report [And] Audit" As Limited To Federal Administrative Reports And Audits Is Supported By The History Of The FCA And The 1986 Amendments To It.

The FCA was originally enacted with the goal of combating the massive fraud engaged in by government contractors supplying the Union Army during the Civil War. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000). Since its original enactment, the FCA has authorized private individuals to bring FCA *qui tam* actions on behalf of the United States, and if successful in obtaining a recovery for the United States, to receive a share of it. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 539-40 (1943). In *Hess*, the Court held that the FCA authorized a *qui tam* action by a relator who had derived the allegations in his complaint solely from information in a federal criminal indictment. *Id.* at 545-48.

In reaction to *Hess*, Congress amended the FCA to remove jurisdiction of the federal courts over *qui tam* actions that were "based upon evidence or information in the possession" of the federal government at the time the *qui tam* action was brought. 31 U.S.C. § 3730(b)(4)(1982). As a result, "once the United States learned of a false claim, only the Government could assert its rights under the FCA against the false claimant." *Hughes Aircraft*

Co. v. United States ex rel. Schumer, 520 U.S. 939, 948 (1991) *Id.* at 948 (citations omitted).

Eventually, Congress concluded that this government-knowledge *qui tam* bar was "too restrictive of *qui tam* actions, resulting in an under-enforcement of the FCA." *United States ex rel Duxbury v. Ortho Biotech Prod.*, 579 F.3d 13, 33 (1st Cir. 2009). In 1986, as part of a major overhaul of the FCA, Congress abolished the "government-knowledge" bar. *Hughes Aircraft*, 520 U.S. at 948 ("the 1986 amendment eliminates a defense to a *qui tam* suit — prior disclosure to the Government"). The 1986 Amendments to the FCA replaced the "government-knowledge" bar with a more narrowly tailored "public disclosure" provision, and thereby "expanded the circumstances under which *qui tam* relators may pursue actions to enforce a false claimant's liability to the Government." *Id.* (citations omitted).

Under that "public disclosure" provision, a potential *qui tam* relator is no longer barred from bringing a *qui tam* suit simply because the federal government is in possession of information relating to the fraud that is the subject of the suit. Instead, he is barred from bringing a *qui tam* lawsuit only where the alleged fraud has been publicly disclosed in the course of the federal government taking actions, e.g., auditing, investigating, reporting, that indicate, in the words of the United States, that "the Government is already on the trail of the fraud," (U.S. Amicus Pet. Br. 10), or will likely be spurred to get on it as a result of the exposure of the fraud to the general public (and the Government) by the news media. And even where the Government is on

the trail of the fraud, the FCA nonetheless allows and encourages the potential relator, under the "original source" exception to file suit if he has first-hand knowledge of the fraud that will contribute to the prosecution of the case.

B. The Drafting History Also Demonstrates Congress' Understanding That The Government Sources Of Public Disclosures In The FCA's Public Disclosure Bar Were Those Of The Federal Government Only.

The drafting history of the 1986 amendments to the FCA demonstrates that Congress, during the entire process, understood the bars to *qui tam* actions as being potentially triggered only by disclosures from federal governmental sources.

The original House bill reported by the House Judiciary Committee barred *qui tam* actions based on disclosures by the federal government or from federal governmental proceedings, and from the news media. Those disclosures were specified as: 1) "specific evidence or specific information which the Government disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding" 2) "specific information disclosed during the course of a congressional investigation," or 3) "specific public information disseminated by any news media." H.R. Rep. No. 660, 99th Cong., 2d Sess. 42 (1986)(proposed 31 U.S.C. §3730 (b)(5)(A)). The bill passed by the House of Representatives contained this provision. *See* 132 Cong. Rec. 22,330, 22,331 and 22,345 (1986).

The Senate bill reported by the Senate Judiciary Committee also contained a *qui tam* bar that was similar in many respects to that of the House bill. It barred *qui tam* actions

> based upon allegations or transactions which are the subject of a civil suit in which the Government is already a party, or [brought] within six months of the disclosure of specific information relating to such allegations or transactions in a criminal, civil, or administrative hearing, a congressional or Government Accounting Office report or hearing, or from the news media.

S. Rep. No. 345, 99th Cong., 2d Sess. 43 (1986)(Senate Report) (proposed 31 U.S.C. § 3730(e)(4)). After the Senate bill was reported, the Senate adopted a substitute version of the bill (Senate substitute bill), *see* 132 Cong. Rec. at 20,530, which clarified that the governmental sources of disclosures in its *qui tam* bar, like the ones in the House bill, were exclusively federal. The Senate substitute bill contained a "public disclosure" bar with language identical to 31 U.S.C. § 3730(e)(4)(A) as finally enacted. *See* 132 Cong. Rec. 20,531(proposed 31 U.S.C. § 3730(e)(5)). However, the bill's proposed "original source" paragraph, paragraph (B), provided, in pertinent part, that to qualify as an original source, *inter alia*, one had to have timely "voluntarily informed the Government or the news media" of the alleged fraud. *Id.* (proposed 31 U.S.C. § 3730(e)(5)(B)). The phrase "Government or the news media" in the paragraph (B) corresponds to the sources of disclosures listed in (A) and puts them into two categories ---- 1)

governmental and 2) "the news media." This interplay between paragraphs (A) and (B) unmistakably indicates Congress' understanding that the governmental sources set forth in (A) were components of the Government, i.e., the federal government.

In describing the substitute bill's *qui tam* provisions, Iowa Senator Charles Grassley, the principal sponsor, voiced this Congressional understanding by pointing out that

> the term 'Government' in the definition of original source is meant to include any Government source of disclosures cited in subsection (5)(A)[subsection (4)(A) as enacted]; that is Government includes Congress, the General Accounting Office, any executive or independent agency as well as other governmental bodies that may have publicly disclosed the allegations.

See 132 Cong. Rec. 20,536.[10] His explanation makes clear that all governmental sources of disclosures listed in paragraph (A) are those of the same Government that is referred to in paragraph (B), that is, the federal government.

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[10] "We did intend, and any fair reading of the statute will confirm, that the disclosure [triggering the public disclosure bar of the FCA] must be in a federal criminal, civil or administrative hearing. Disclosure in a state proceeding of any kind should not be a bar to a subsequent *qui tam* suit." 132 Cong. Rec. 16031-33 (1999)(letter addressed to U.S. Attorney General Janet Reno from Rep. Howard Berman and Senator Charles Grassley (primary sponsors of the 1986 Amendments to the FCA)).

The reference to "the news media" was subsequently dropped from paragraph (B) in the version of the Senate bill that was enacted into law. However paragraph (B)'s reference to the Government remained in the final version, and paragraph (A) was enacted into law unchanged. It is inconceivable that the subsequent change to paragraph (B) somehow altered Congress' understanding of that the federal governmental sources of disclosure listed in paragraph (A) were exclusively federal.

C. Congress Added The "Administrative . . . Audit Or Investigation" Language To The Public Disclosure Bar In Conjunction With Its Expansion Of Federal Administrative Tools And Proceedings To Fight Fraud In FCA's Companion Statute, PFCRA.

The events surrounding the Senate's passage of its FCA substitute bill on August 11, 1986, show that Congress added the "administrative . . . audit or investigation" language to Category 2 of the "public disclosure" bar as part of a package of comprehensive antifraud legislation that included both the 1986 Amendments to the FCA, and Senate bill S. 1134, Program Fraud Civil Penalties Act (PFCPA), which dramatically expanded the scope of federal administrative investigations and proceedings to fight false and fraudulent claims against the Government.

The original Senate bill for the 1986 Amendments to the FCA provided that the Government could elect to pursue a recovery for the

false claims "through any alternate remedy available to it, including, but not limited to any administrative civil money penalty proceeding." S. Rep. 345, at 42 (proposed 31 U.S.C. § 3730 (c)(3)). The Senate Report noted that while the Department of Health and Human Services was currently authorized to use administrative proceedings for the recovery of false claims, the Senate Governmental Affairs Committee had favorably reported S. 1134 [PFCPA], "which would extend this type of administrative mechanism for addressing false claims to all Executive agencies." S. Rep. 345, at 27. The Report noted that the Senate Judiciary Committee "intends that if civil money penalty proceedings are available, the Government may elect to pursue the claim either judicially or through an administrative civil penalty proceeding." *Id.*

On July 28, 1986, Senator Grassley reported that, after working "to reach a consensus on comprehensive antifraud legislation," a compromise had been reached that would permit the passage of both the PFCRA bill and the FCA bill. 132 Cong. Rec. 17,936 (July 29, 1986). At Senator Grassley's request, the two bills, which incorporated the compromise amendments, were printed in the Congressional Record. *Id.* at 17,936-46. The PFCRA bill expanded the availability of the civil money penalty proceedings to all federal executive agencies. *Id.* at 17,937-43 (proposing 5 U.S.C. § 801 *et seq.*). It also designated the agencies' inspectors general (IGs) as the primary investigatory officials, making reference to the Inspector General Act of 1978. *Id.* at 17,936 (proposed 5 U.S.C. § 801(a)(5)). That Inspector General Act of 1978 consolidated the responsibility to "conduct . . . audits and

investigations" of an agency under its IG. Pub. L. No. 95-452, § 4(a)(1), 92 Stat. 1101, 1102 (1978)(codified as amended at 5 U.S.C. App. 4(a)(1)).

The FCA substitute bill brought the first paragraph of the public disclosure bar into final form, in part, by adding to Category 2 the terms "administrative" and "audit or investigation:"

> . . . allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, [administrative] or Government Accounting Office report[,] ~~or~~ hearing, [audit, or investigation,] or from the news media.

Compare 132 Cong. Rec. 20,538 (Aug. 11, 1986)(proposed 31 U.S.C. § 3730(e)(5)[enacted as 31 U.S.C. § 3730(e)(4)(A)]) *with* S. Rep. No 345 at 43 (changes indicated). The substitute bill also added "or an administrative civil money penalty proceeding" to the provision immediately preceding the bill's "public disclosure" bar, making it identical to 31 U.S.C. § 3730(e)(3) as finally enacted:

> In no event may a person bring an action . . . based upon allegations or transactions which are the subject of a civil suit [or an administrative civil money penalty proceeding] in which the Government is already a party.

Compare 132 Cong. Rec. 20538 *with* S. Rep. No 345 at 43 (changes indicated).

Thus, these changes, including the addition of Category 2 language "administrative" and "audit or investigation," were made in the context of a

Congressional effort to establish a comprehensive anti-fraud program that would include administrative investigations and proceedings authorized under PFCRA, which "was designed to operate in tandem with the FCA."[11] *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 786 n. 17 (2000). This further evidences the federal focus of the FCA in general, and of the administrative sources in Category 2 of the "public disclosure" bar in particular.

Congress' exclusive focus on enforcement by federal administrative agencies when it crafted an administrative remedy for false claims against the government comports with its view that the law enforcement response to fraud against the federal government was the exclusive responsibility of federal agencies. This is because "[u]nlike most other types of crimes or abuses, fraud against the Federal Government can be policed by only one body — the Federal Government." S. Rep. No. 345 at 7.

Accordingly, the history of the FCA, and its 1986 Amendments, demonstrate that Congress intended and understood that "administrative . . . reports, audits, and investigations" in Section 3730(e)(4)(A) referred solely to those of federal administrative agencies, and that the rest of the governmental sources of disclosures therein were exclusively federal.

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[11] The Program Fraud Civil Remedies Act, 31 U.S.C. § 3801 *et seq.*, was enacted at virtually the same time as the 1986 Amendments to the FCA. *See Stevens*, 529 U.S. at 765.

III. The Purposes Of The FCA Are Furthered By The Fourth Circuit's Construction.

A. Petitioners' Construction Would Reimpose A Form Of The "Government Knowledge" Bar, Frustrating The Purposes Of The 1986 FCA Amendments.

The Fourth Circuit's construction of sources in Category 2 of the "public disclosure" bar as limited to federal proceedings furthers Congress' purposes for the 1986 FCA Amendments. Conversely, Petitioners' construction undermines them.

This Court has recognized that a key purpose of the 1986 Amendments to the FCA was to encourage more *qui tam* suits by narrowing the scope of the jurisdictional bar "to allow private parties to sue even based on information already in the Government's possession." *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003). This was accomplished by replacing the *qui tam* bar triggered by mere federal *possession* of fraud information (the "government knowledge" bar), with one triggered by the federal *pursuit* of the fraud. Specifically with respect to provisions in Category 2 of the "public disclosure" bar at issue here, the bar is triggered only where a public disclosure indicates that the federal government is auditing, reporting, or investigating the fraud.

On the other hand, State and local audits, reports and investigations are by definition not activities of the federal government and, like the mere possession of fraud information by the federal government, give no indication that the federal government is pursuing the fraud. Thus, reading

the Category 2 language "administrative . . . audit, report, or investigation" as encompassing state and local government reports "would, in effect, return us to the unduly restrictive 'government knowledge' standard" *Dunleavy*, 123 F.3d at 746. But it would be a version far more restrictive than even the original one because it would replace the "government knowledge" bar's *actual* possession of information standard with a standard of *deemed* federal possession of the fraud information in the state and local reports, whether or not the federal government actually possessed the reports.

Accordingly, Petitioners' construction would frustrate the purposes of the 1986 Amendments by expanding, rather than reducing, the jurisdictional bar, and thereby reduce, rather than increase, the number of *qui tam* suits.[12] Conversely, the Fourth Circuit's construction, by allowing *qui tam* actions based on information that the federal government merely possesses, even if it is in the form of a state or local government report, the Fourth Circuit's construction furthers Congress' purpose for the 1986 FCA Amendments "to encourage more private enforcement suits." S. Rep. 345, at 23.

Whether the Government has access to the reports because it possesses them in its own file cabinets, or because they are available in electronic file cabinets like the Federal Clearinghouse, to bar

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[12] Petitioners' construction would encompass numerous state and local government reports and audits that are stashed away with millions of other documents in dusty file cabinets in thousands of municipal, county and state government office buildings around the country, which will never come to the attention of the federal government.

qui tam suits based merely on that theoretical access still frustrates Congress' purpose of narrowing the scope of the bar to "allow private parties to sue even based on information already in the Government's possession." *Chandler*, 538 U.S. 119, 133 (2003).

Construing Section 3730(e)(4)(A) as encompassing audit reports that were obtained by grantees of federal funds to comply with the Single Audit Act, 31 U.S.C. § 7501-7507, like the CPA Report, illustrates some of the troubling questions raised by the attempt to characterize reports and audits by nonfederal entities as Category 2 administrative audits and reports. The Single Audit Act requires each "non-federal entity" receiving federal funds in excess of a threshold amount to obtain an audit. 31 U.S.C. § 7502(a). This audit requirement is imposed on governmental and private recipients alike. *Id.* at § 7501(a)(13)("'non-federal entity' means a State, local government, or nonprofit organization"). The resulting audit reports, like the CPA Report, can be prepared and issued by a public accountant, e.g., a CPA in private practice. *Id.* at § 7501(a)(8)(B). Thus, unlike federal agency audit reports, there is nothing even particularly "governmental" about the resulting Single Audit Act audit report. Rather, it is the result of a private person or entity (CPA or CPA firm) auditing a grantee of federal money, which, in the case of the CPA Report, just happens to be a local governmental entity.

There is no question that Crisp & Hughes, the entity that performed the audit and issued the CPA Report, was a nongovernmental private entity.

Accordingly, the CPA Report is a report *by* Graham County, as opposed to a report *about* Graham County, only in the sense that Graham County hired the CPA firm to do the audit. The characterization of the CPA Report as a report by Graham County on the basis that it is its agent's report is undercut by the Single Audit Act's requirement that the audit be performed by a CPA who is "independent." 31 U.S.C. § 7502(c). That is, of course, "independent" of the grantee he is auditing. Thus, the assertion that Crisp & Hughes acted as an "agent" of Graham County in performing the audit and issuing the CPA would be true, at most, only in a narrow, technical sense.

Construing the FCA's public disclosure bar as encompassing local government reports is particularly troublesome where the local government is properly considered both the source of the purported disclosure (as the Petitioners assert with respect to the CPA Report) and a potential defendant in a *qui tam* action. As the Third Circuit noted, "[i]f state and local government reports were treated as administrative reports under the Act, the jurisdictional bar might be invoked through information submitted by those bent on convincing a federal agency that no fraud, in fact, was occurring." *Dunleavy*, 123 F.3d at 734, 745.

In fact, the local government might need not even do any such convincing to immunize itself from a *qui tam* action. Rather, it would only have to go to the minimal effort of issuing a self-serving investigative report; and making a very limited publication of that report, perhaps as a handout at one of its

public meetings.[13] After its initial distribution of copies to a few members of the public, then it could be filed away. If this were to occur, the federal government might never learn of its existence, yet, the fraudulent local government would then be immune from a *qui tam* suit except by one who qualifies as an original source. This is a true moral hazard of Petitioner's position — it creates the incentive for such white-washing "internal investigations" to become standard operating procedure for local governments under the guise of litigation avoidance.

Petitioners suggest that the Fourth Circuit decision would have a "chilling" effect on local governments investigating and reporting irregularities in their spending of federal funds because potential whistleblowers could scour local government reports for signs of fraud, and then bring *qui tam* actions. Pet. 31-32. This concern is overblown. Other incentives against self-reporting of irregularities and fraud, such as the potential for criminal prosecution, and the loss of federal grant monies, would certainly weigh more heavily on the investigation and reporting decision than would the prospect of a *qui tam* action. Moreover, Congress has already chosen which incentives to provide for the self-reporting of FCA violations. *See* 31 U.S.C. §

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[13] Courts have held that, for purposes of the FCA's public disclosure bar, "publicly disclosed" means a disclosure to even a single person, as long as that person is a "stranger to the fraud" outside of the government who is not precluded from further disseminating the information. *See, e.g., United States ex rel. Fine v. MK-Ferguson Co.* 99 F.3d 1538, 1544-45 (10th Cir. 1996); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322-23 (2nd Cir. 1992).

3729(a) (court authorized to assess double, rather than triple damages). Immunity from *qui tam* actions is not one of them.

B. Petitioners' "News Media" Anomaly Argument Is Misplaced.

Petitioners suggest that the Fourth Circuit's construction of the "public disclosure" bar is flawed because it could create the anomalous result of the bar being triggered by allegations in a local newspaper of limited circulation, but not triggered by allegations of fraud in a widely disseminated audit by a state government official. Pet. Br. 33-35. However, Congress likely understood and expected that any significant public disclosure of actionable fraud (from other than federal sources) would be discovered and disseminated to the public by the news media. Thus, using Petitioners' example, a state audit report containing allegations of fraud against the federal government that were readily ascertainable from the report, those allegations would likely be reported by the news media.

C. Petitioners' Overly Broad "Parasitic" *Qui Tam* Action Definition Is At Odds With The Text, History, And Purposes Of The FCA.

Petitioners argue that the Fourth Circuit's decision is contrary to the purposes of the FCA because it promotes parasitic *qui tam* actions that the "public disclosure bar" was designed to deter. Pet. Br. 20. This argument fails because their definition of parasitic relators — those "who simply rely on information that has been publicly disclosed," Pet. Br. 30-31, is overly broad and is at odds with the

actual design of "public disclosure" bar, as well as its history and purpose.

The text of the "public disclosure" bar reflects Congress' clear choice not to require that every *qui tam* relator be an original source of his allegations. Instead, Congress limited the scope of the *qui tam* bar to disclosures from only certain specific sources. *See Eberhart v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 870 (4th Cir. 1999); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499-1500 (11th Cir. 1991).

If Congress had wanted to discourage relators from basing its *qui tam* actions on any "information that has been publicly disclosed," no matter what the source of the disclosure, it could have simply prohibited *qui tam* suits based on any public disclosure of the allegations unless the relator was an original source. But it chose not to do so. Thus, the "public disclosure" bar is not designed to deter *qui tam* actions based on disclosures, or even public disclosures, of allegations from a source not listed in section 3730(e)(4)(A).

For example, no one could reasonably argue that the "public disclosure" bar is designed to deter a relator from basing a *qui tam* suit on allegations of fraud publicly disclosed by a corporation or a public interest group, even if the relator was a stranger to the fraud, so long as the allegations had not also been disclosed by the news media or one of the other sources listed in the bar. Instead, the FCA encourages the relator in that circumstance to bring *qui tam* action by incentivizing him with a guaranteed share of any recovery he achieves for the Government.

Petitioners shed crocodile tears for the hypothetical "insider" who has worked for years in gathering information in order to expose corruption only to lose the race to the courthouse to a "stranger to the fraud" who files a *qui tam* action based on the revelation of fraud in a publicly disclosed state audit. Pet. Br. 31. However, the FCA is not designed to sort out and reward who might be the "best" or most "deserving" relator. Rather, FCA's "first to file" rule reflects Congress' choice to put a premium on the prompt exposure of fraud by the filing of *qui tam* actions.

Driving Congress' empowerment and encouragement of *qui tam* relators by the 1986 Amendments was its determination that "[f]raud permeate[d] generally all Government programs," S. Rep. 345, at 2, and that, as a result of the federal government's lack of resources to investigate all of that fraud, it was "forced to make 'screening' decisions" of whether to investigate fraud allegations "based on resource factors." S. Rep. 345, at 7. Consequently, "[a]llegations that perhaps could develop into very significant cases are left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient." *Id.* In other words, there is simply too much fraud for the Government to handle alone and it has its hands full just with the fraud it already knows about.

Accordingly, even those citizens who lack first-hand knowledge of a fraud l play a valuable role in supplementing the government's law enforcement by filing and prosecuting *qui tam* suits and recovering money for the Government. The Fourth

Circuit's construction of the "public disclosure" bar promotes those *qui tam* suits unless there is an indication that the Government is already on the trail of the fraud and is therefore likely to take action itself.

Petitioners' position, if adopted, would result in fewer *qui tam* suits filed and prosecuted to successful completion. For each *qui tam* suit that is barred, where the Government did not then file its own FCA action, either through a lack of knowledge, or a lack of resources, the result would be a lost potential recovery of defrauded taxpayer dollars. On the other hand, even in *qui tam* cases that the Petitioners deride as "parasitic," where the Government intervenes (but would have filed its own FCA action but for the first-filed *qui tam*), the United States nonetheless enjoys 75% to 85% of the recovery.

The Fourth Circuit's construction is the only one which is consistent with the purpose of the FCA to increase the United States' potential recovery as contemplated by the FCA; is faithful to the text; and is consistent with the FCA's legislative history.

CONCLUSION

Based on the foregoing, relator Wilson respectfully requests that the Court affirm the decision of the court of appeals reversing the order of the district court.

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AMICUS CURIAE BRIEF

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No. 08-304

In the Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

The False Claims Act (FCA) provides that no court has jurisdiction over a *qui tam* action "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media," unless the relator "is an original source of the information." 31 U.S.C. 3730(e)(4)(A). The question presented is as follows:

Whether a state or local government report or audit qualifies as a "congressional, administrative, or Government Accounting Office report * * * [or] audit" within the meaning of the FCA.

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INTEREST OF THE UNITED STATES

This case involves the "public disclosure" bar of the False Claims Act (FCA), 31 U.S.C. 3730(e)(4). An overly broad construction of the bar will preclude *qui tam* actions in circumstances in which relators serve the valuable function of bringing to light fraud against the federal fisc; an unduly narrow construction risks requiring the government to share its recovery with a relator when the government was already on the trail of fraud and the relator added nothing of value to the government's suit. The United States therefore has a substantial interest in the Court's construction of the "public disclosure" provision. At the Court's invitation, the

United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. The FCA, 31 U.S.C. 3729 *et seq.*, provides for the imposition of civil penalties and treble damages against any person who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The Attorney General may bring a civil action if he finds that a person has committed a violation. 31 U.S.C. 3730(a). Alternatively, a private person (known as a relator) may bring a "*qui tam*" civil action "for the person and for the United States Government." 31 U.S.C. 3730(b)(1). The government may intervene and take over the relator's action. 31 U.S.C. 3730(b)(2)-(4). If the government declines to intervene, the relator conducts the litigation. 31 U.S.C. 3730(c)(3). If a *qui tam* action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

The FCA's "public disclosure" provision states:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office [(GAO)] report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and inde-

> pendent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. 3730(e)(4) (footnote omitted).[1]

2. In February 1995, after a storm caused extensive flooding and erosion in western North Carolina, petitioners Graham County and Cherokee County applied for aid under the Emergency Watershed Protection Program (EWP Program), a federal disaster relief program. The Natural Resources Conservation Service (NRCS), an agency of the United States Department of Agriculture (USDA), administers the EWP Program. The counties and the NRCS entered into contracts under which the counties would perform, or hire a contractor to perform, necessary clean-up and repairs, with USDA bearing 75% of the costs. The Graham and Cherokee County soil and water conservation districts administered the contracts. Pet. App. 7a.

Respondent Karen Wilson was a secretary at petitioner Graham County Soil and Water Conservation District (Graham Conservation District). In the summer of 1995, respondent raised concerns with county and conservation district officials about alleged fraud by petitioners in connection with the EWP program. In December 1995, respondent sent a letter reporting her alle-

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[1] Section 3730(e)(4)(A) as enacted refers to the "Government Accounting Office." Both the compilers of the United States Code and the courts have construed that term to refer to the *General* Accounting Office (now renamed the Government Accountability Office). See 31 U.S.C. 3730 n.2; *United States ex rel. Mistick PBT* v. *Housing Auth.*, 186 F.3d 376, 387 (3d Cir. 1999), cert. denied, 529 U.S. 1018 (2000); Pet. App. 19a n.4.

gations to the NRCS, and in November 1996 she met with agents from the USDA Inspector General's office. Pet. App. 9a-10a.

In April 1996, an outside auditing firm, Crisp, Hughes & Co., prepared an audit (the Crisp Hughes Report) at the request of Graham County regarding the administration by County and Graham Conservation District of the EWP contracts. Pet. App. 11a; J.A. 119-126. The Crisp Hughes Report identified numerous issues of concern, including the decision to hire a Graham Conservation District employee to perform EWP Program contract work and the failure to seek bids for that work. Pet. App. 9a, 11a; J.A. 126. In May 1996, the North Carolina Department of Environment, Health and Natural Resources issued a report (the DEHNR Report) that discussed the Graham Conservation District's non-compliance with various requirements of the North Carolina Agricultural Cost Sharing Program. Pet. App. 97a.

3. In 2001, respondent filed a *qui tam* suit in federal district court, alleging that petitioners had violated the FCA by making numerous false claims for payment under the EWP Program. Pet. App. 11a; 48a-52a. Respondent asserted, *inter alia*, that petitioners had failed to seek bids for EWP Program contract work and had awarded such work to a Graham Conservation District employee who had a conflict of interest. *Id.* at 12a. The United States declined to intervene, and respondent proceeded with the litigation. *Id.* at 48a n.1.[2]

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[2] Respondent also asserted a retaliation claim. Pet. App. 5a n.1. On remand from this Court's decision in *Graham County Soil & Water Conservation District* v. *United States ex rel. Wilson*, 545 U.S. 409 (2005), the court of appeals dismissed the retaliation claim as time-barred.

The district court held that it lacked jurisdiction over respondent's FCA claims. Pet. App. 95a-105a. The court ruled that the Crisp Hughes Report constituted a public disclosure of respondent's allegations that the Graham Conservation District had failed to solicit bids for EWP Program contract work and had improperly hired an employee to perform this work. *Id.* at 95a-96a. The court found that respondent "ha[d] not refuted" petitioners' contentions that the Crisp Hughes Report had been publicly disclosed, that she had relied on the report, and that she was not an original source of the allegations. *Id.* at 96a. The court also determined that the DEHNR Report had publicly disclosed allegations of Graham County's improprieties in connection with the North Carolina Agricultural Cost Sharing Program, and that respondent was not an "original source" of those allegations. *Id.* at 97a-98a. In the alternative, the district court granted summary judgment to petitioners on the merits of respondent's FCA claims. *Id.* at 106a-152a.

4. The court of appeals vacated and remanded. Pet. App. 1a-46a. The court observed that a conflict among the circuits existed on the question whether the phrase "congressional, administrative, or [GAO] report[s], hearing[s], audit[s], or investigation[s]" in Section 3730(e)(4)(A) encompasses administrative reports issued by a State or county. *Id.* at 18a-21a. The court agreed with the Third Circuit (see *United States ex rel. Dunleavy* v. *County of Del.*, 123 F.3d 734, 745 (1997)) that this phrase, which comprises the second category of disclosures within the public disclosure provision (Category 2), encompasses only *federal* audits, reports, hearings and investigations. Pet. App. 22a-37a. The court noted that the terms "congressional" and GAO refer to

"clearly *federal* sources." *Id.* at 23a. The court of appeals recognized that "there is nothing inherently federal about the word 'administrative.'" *Ibid.* The court concluded, however, that, for purposes of Section 3730(e)(4)(A), "the placement of 'administrative' squarely in the middle of a list of obviously federal sources strongly suggests that 'administrative' should likewise be restricted to *federal* administrative reports, hearings, audits, or investigations." *Id.* at 23a-24a.

The court of appeals further found that the relevant legislative history supported its interpretation. Pet. App. 34a-35a. The court explained that when Congress amended the FCA in 1986, it enacted the current "public disclosure" bar to "further the twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *Id.* at 35a (internal quotation marks and citation omitted). The court reasoned that the federal government is unlikely to learn about state or local audits or investigations, and that including such audits and investigations within the scope of the "public disclosure" bar would therefore frustrate Congress's purpose. *Id.* at 35a-36a.

Accordingly, the court of appeals held that neither the Crisp Hughes Report nor the DEHNR Report fell within the scope of the "public disclosure" bar. Pet. App. 37a. The court remanded to the district court to determine whether a USDA report regarding administration of the EWP Program contracts had been publicly disclosed.[3] The court of appeals further held that the

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[3] Petitioners concede that the USDA report cannot bar respondent's "principal claim" because that report did not address whether the conservation districts were required to solicit bids for EWP Program contract work. Pet. 6 n.2.

district court had erred by addressing the merits after finding that it lacked jurisdiction. The court of appeals therefore vacated the district court's decision on the merits. *Id.* at 44a-45a.

SUMMARY OF ARGUMENT

1. As the court of appeals correctly held, state and local administrative reports, audits, and investigations are not among the classes of documents that Congress identified as triggering the FCA's public disclosure bar. The context within which the word "administrative" appears, located between two terms—"congressional" and GAO—that are unambiguously federal in nature, clearly conveys Congress's intent that the word be limited to *federal* executive branch entities. That conclusion is confirmed by the exclusively federal nature of the FCA more generally, which provides a cause of action by the federal government for fraud against the United States, and permits *qui tam* actions when federal officials are not in a position to pursue the claim of fraud.

2. Reading the public disclosure bar to encompass state and local administrative reports and investigations would undermine Congress's purposes. Congress sought to balance two sometimes competing objectives, precluding *qui tam* suits when the federal government is already pursuing, or is likely to be in a position to pursue, a fraud claim without the assistance of a relator, while permitting *qui tam* actions when the federal government is unlikely to be in a position to pursue a claim independently. In pursuing these aims, Congress chose not to bar all *qui tam* suits that are based upon publicly-disclosed information. The narrow class of public disclosures that trigger the bar reflects Congress's decision to preclude only lawsuits likely to be duplicative of the fed-

eral government's own enforcement efforts—*i.e.*, those based on information publicly disclosed in a way suggesting that the federal government was already, or was likely to be, on the trail of the fraud. The legislative history of the 1986 FCA amendments, which were intended to expand the range of *qui tam* suits beyond what the prior government-knowledge bar had allowed to go forward, further confirms the court of appeals' reading of Section 3730(e)(4)(A).

3. Petitioners' contrary arguments prove too much, and even petitioners do not embrace the natural consequences of their theories. Petitioners acknowledge that only administrative reports, audits, or investigations of a governmental character should qualify under Category 2. Yet some of petitioners' arguments in favor of including state and local governmental reports within that category would equally imply that reports or investigations by a private non-profit hospital or university administration would trigger the bar.

Petitioners invoke, for example, a dictionary definition of "administration." Unanchored by the adjacent terms in Category 2, however, a literal dictionary definition would also encompasses the "administration" of large private institutions—a position petitioners disavow. Likewise, petitioners highlight that certain, though by no means all, state and local governmental audits are required to be shared with the federal government. That requirement also applies, however, to certain audits by nonprofit organizations, such as hospitals and universities. Congress did not intend that such institutions—frequent participants in federal programs and frequent defendants in litigation under the FCA—could shield themselves from *qui tam* suits by issuing reports that allude to, but then seek to refute, allega-

tions of fraud. Neither did Congress intend that local governmental entities could achieve that result.

Petitioners' attempt to expand Category 2 of the public disclosure bar beyond its self-evident federal scope should be rejected.

ARGUMENT

STATE AND LOCAL GOVERNMENT REPORTS AND AUDITS ARE NOT COVERED BY THE FCA'S "PUBLIC DISCLOSURE" PROVISION

The court of appeals correctly construed the second set of "public disclosure[s]" referenced in 31 U.S.C. 3730(e)(4)(A) as encompassing only *federal* administrative reports, hearings, audits, and investigations. That conclusion is supported by the context in which the word "administrative" appears, sandwiched between the indisputably federal terms "congressional" and "Government Accounting Office." The federal character of Category 2 is further supported by the exclusively federal character of the FCA as a whole, and by other references in the statute to explicitly federal administrative proceedings.

Construing Category 2 in this way furthers Congress's purpose in replacing the prior government-knowledge bar with current Section 3730(e)(4). Congress sought to narrow the prior jurisdictional bar by precluding only those *qui tam* actions based on public disclosures whose nature indicates that the federal government is already pursuing, or will likely be in a position to pursue independently, the allegations of fraud. Petitioners' construction of Section 3730(e)(4)(A) would instead expand the prior bar by preventing as well *qui tam* actions based on state and local government reports, which might never have come to the federal gov-

ernment's attention and might have been written specifically to shield state and local governments from suit. This Court should reject that reading.

A. Section 3730(e)(4)(A) Does Not Encompass Public Disclosures Made In State Or Local Government Administrative Audits Or Reports

Section 3730(e)(4)(A) identifies three categories of "public disclosure[s]" that can trigger the FCA's jurisdictional bar: (1) disclosures in "a criminal, civil, or administrative hearing"; (2) disclosures in "a congressional, administrative, or [GAO] report, hearing, audit, or investigation"; and (3) disclosures in "the news media." 31 U.S.C. 3730(e)(4)(A). This case presents the question whether Category 2 encompasses disclosures in state and local governmental administrative reports, hearings, audits, and investigations, or instead is limited to disclosures made in federal administrative proceedings. Properly construed within its overall statutory context, Category 2 is limited to disclosures made in a *federal* administrative report, hearing, audit, or investigation.

1. "Statutory language must be read in context and a phrase 'gathers meaning from the words around it.'" *Jones* v. *United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)); see *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) ("doctrine of *noscitur a sociis*" serves "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words"). This Court recently applied the canon of *noscitur a sociis* in *United States* v. *Williams*, 128 S. Ct. 1830 (2008). The Court recognized that the terms "promotes" and "presents" in 18 U.S.C. 2252A(a)(3)(B), concerning the pandering or solicitation of child pornography, were "susceptible of

multiple and wide-ranging meanings" if they were "taken in isolation." *Williams*, 128 S. Ct. at 1839. The Court concluded that this range of meanings was "narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated" (in that case, "a list that includes 'solicits,' 'distributes,' and 'advertises'"). *Ibid.* Applying that approach, the Court construed the word "promotes" to mean "the act of recommending purported child pornography to another person for his acquisition," and the term "presents" to mean "showing or offering the child pornography to another person with a view to his acquisition." *Ibid.*

Construed in accordance with those principles, Category 2 in Section 3730(e)(4)(A) is limited to the reports, hearings, audits, and investigations of the *federal* government. In its application to legislative bodies or the investigative arms of legislative bodies, Category 2 is unambiguously limited to disclosures made in federal proceedings. As the court of appeals observed, "the exclusively federal nature of the terms 'congressional' and '[General] Accounting Office' is immediately apparent." Pet. App. 25a. The way in which "these clearly federal terms bookend the not-so-clearly federal term," the court concluded, "provid[es] a very strong contextual cue" that the word "administrative" was also intended to have an exclusively federal character. *Ibid.* As the Third Circuit has also explained, it is unlikely "that the drafters of this provision intended the word 'administrative' to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character." *United States ex rel. Dunleavy* v. *County of Del.*, 123 F.3d 734, 745 (3d Cir. 1997). That the term "administrative," read in isolation,

could refer to the administration of a hospital, university, or executive branch of a state or local government as well as a federal executive agency is of no import where, as here, the placement of the term renders apparent its more limited meaning.

Petitioners contend (Br. 23) that the Court should disregard the canon of *noscitur a sociis* in construing Section 3730(e)(4)(A) because that provision reflects such "poor congressional draftsmanship" that Congress cannot be assumed to have given "careful consideration to either its word choice or the order of the listing." That argument, however, would equally impugn petitioners' contention (Br. 17) that the provision should be construed in accordance with its "plain and readily understood meaning." (Petitioners do not say how they derive such meaning if neither word choice nor word order can be trusted.) In any event, at a prior stage of this very case, the Court did precisely what petitioners say is out-of-bounds—construe ambiguous terms in the FCA in light of their surrounding text and the broader statutory structure. See *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 415 (2005) ("[s]tatutory language has meaning only in context"). So too the Court should follow this perfectly ordinary means of statutory construction in giving meaning to Category 2.

2. The federal character of Category 2 is reinforced by that of the FCA more generally, including in its other references to "administrative" proceedings. Most notably, the FCA provides a remedy only for false claims against "the United States Government." 31 U.S.C. 3729(a)(1). Suit may be brought by the United States Attorney General or, in certain circumstances, by *qui tam* relators who sue "for the United States Govern-

ment" and collect a portion of the federal government's recovery, 31 U.S.C. 3730(b)(1) and (d). To the extent that state or local governmental entities may become parties to actions under Section 3730, they do so in the same capacity as private individuals—*i.e.*, as defendants or *qui tam* relators. See, *e.g.*, *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 134 (2003) (holding that local governments are subject to suit as "person[s]" under 31 U.S.C. 3729); cf. *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 787 n.18 (2000) (noting, without resolving, the question whether "States can be 'persons' for purposes of *commencing* an FCA *qui tam* action").

The exclusively federal focus of the FCA's governmental references is also seen in the use throughout Sections 3729 and 3730 of the term "the Government," singular and with a capital "G," to refer exclusively to the *federal* government. See, *e.g.*, 31 U.S.C. 3729(a)(2)-(7); 31 U.S.C. 3730(b)(1)-(3), (e)(2)(A), (3) and (4)(B). Indeed, Paragraph (B) of Section 3730(e)(4), which defines the term "original source" for purposes of the public disclosure bar, limits that term to relators who have voluntarily provided the relevant information to "the Government" before filing a *qui tam* action. The single, capital G, "Government" referenced in Paragraph (B)'s "original source" exception is the *federal* government, as the numerous other references to "the Government" elsewhere in 31 U.S.C. 3730 make clear. The most sensible reading of the jurisdictional bar in Paragraph (A) is that it covers only public disclosures by the same government as "the Government" referenced in the "original source" exception.

In addition, several other references to "administrative" proceedings in Sections 3729 and 3730 are limited

to federal proceedings. For example, Section 3729(a) permits reduction of an FCA damages award if the defendant, *inter alia*, "furnished the United States with the information about the violation" at a time when "no criminal prosecution, civil action, or administrative action had commenced under [Title 31] with respect to such violation." 31 U.S.C. 3729(a)(C). The FCA also precludes *qui tam* actions based on allegations that "are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party." 31 U.S.C. 3730(e)(3). These other references to "administrative" proceedings are clearly federal in nature.

The historical context in which the public disclosure bar was enacted further suggests that Congress had federal administrative proceedings in mind when it added the word "administrative" to Category 2. One week before enacting the False Claims Amendments Act of 1986 (1986 FCA amendments), Pub. L. No. 99-562, 100 Stat. 3153, Congress enacted the Program Fraud Civil Remedies Act of 1986 (PFCRA), Pub. L. No. 99-509, Title VI, § 6103(a), 100 Stat. 1937 (31 U.S.C. 3801 *et seq.*). The PFCRA established federal administrative remedies for fraud, and designated the various federal executive agencies' offices of inspector general as the investigating officials. See 31 U.S.C. 3801(a)(4). Congress considered the PFCRA jointly with the 1986 FCA amendments. See 100 Stat. 3153; *Overview of False Claims and Fraud Legislation: Hearing Before the S. Comm. on the Judiciary*, 99th Cong., 2d Sess. 5 (1986) (discussing FCA amendments and the PFCRA). Thus, Congress likely added "administrative" audits or investigations to Category 2 to cover disclosures made within

the context of federal administrative proceedings like those contemplated in the PFCRA.

Given the exclusively federal character of the FCA's other governmental references, including references to federal administrative proceedings, all on top of the references to Congress and the GAO within Category 2 itself, the "administrative * * * report[s] [and] audit[s]" covered by Section 3730(e)(4)(A) do not include reports or audits by state or local governmental entities. See, *e.g.*, *Gutierrez* v. *Ada*, 528 U.S. 250, 254-255 (2000) (Court applied *noscitur a sociis* to hold that the term "any election" in the Organic Act of Guam is limited to elections for Governor and Lieutenant Governor, since the term "is preceded by two references to gubernatorial election and followed by four," and the relevant section of the Organic Act "contains six express references to an election for Governor and Lieutenant Governor.").

3. To read the term "administrative" in the FCA "public disclosure" provision more broadly than the words surrounding it would also place a State's legislature on a lesser footing than a local county administrator. With respect to legislative bodies, Section 3730(e)(4)(A) is unambiguously limited to reports and investigations of Congress and its investigative arm, the GAO. Section 3730(e)(4)(A)'s clear exclusion of state legislative reports suggests that reports by state and local "administrative" bodies likewise are not covered.

Petitioners argue (Br. 39) that Section 3730(e)(4)(A)'s exclusion of state legislative reports is unsurprising because of "the limited oversight role that state legislatures play with respect to federally funded programs." The premise of that argument is questionable: petitioners primarily cite as support a 30-year-old GAO report aimed at fostering (as its title indicates)

"*Greater Involvement by State Legislatures.*" Pet. Br. 37 (citing GAO, *Federal Assistance System Should Be Changed to Permit Greater Involvement by State Legislatures* (1980)). And even if state legislatures do not *frequently* prepare reports regarding states' use of federal funds, Congress would have had no evident reason to distinguish any such documents from the state and local administrative reports that petitioners contend trigger the public disclosure bar.

B. Congress's Purposes In Enacting Section 3730(e)(4)(A), And The Legislative History Of That Provision, Further Support The Court Of Appeals' Decision

The purposes and history of the "public disclosure" bar also support construing Category 2 (and Category 1, for that matter, see pp. 25-26, *infra*) as limited to federal proceedings. The "public disclosure" bar is intended to "further the twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." Pet. App. 35a (internal quotation marks and citation omitted). In determining which public disclosures would bar a *qui tam* suit, Congress sought to identify categories of disclosures whose nature indicates that the federal government is already on the trail of the alleged fraud. Documents prepared by state and local governments do not give rise to any such inference.

1. Since its original enactment during the Civil War, the FCA has authorized *qui tam* relators to sue for both the United States and themselves, and to obtain a share of the government's recovery if the suit is successful. See *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 551-552 (1943). Such private actions supplement gov-

ernment enforcement efforts, and thereby deter fraud, by harnessing "the strong stimulus of personal ill will or the hope of gain." *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) (quoting *United States* v. *Griswold*, 24 F. 361, 366 (D. Or. 1885)).

Congress twice has amended the FCA's *qui tam* provisions in an effort to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Springfield Terminal Ry.*, 14 F.3d at 649. Early in the FCA's history, "the statute was abused by qui tam suits brought by private plaintiffs who had no independent knowledge of fraud," *Seal 1* v. *Seal A*, 255 F.3d 1154, 1158 (9th Cir. 2001), cert. denied, 535 U.S. 1017 (2002), yet could receive one-half of the proceeds. In *Marcus*, for example, this Court held that the FCA in its then-current form authorized a *qui tam* suit brought by a relator who had derived his allegations of fraud from a prior federal indictment. See 317 U.S. at 545-548.

In 1943, shortly after the *Marcus* decision, Congress amended the FCA to divest the courts of jurisdiction over *qui tam* suits that were "based on evidence or information the Government had when the action was brought." 31 U.S.C. 3730(b)(4) (1982).[4] In that context, the reference to "the Government" unambiguously was limited to the federal government, which could choose to

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[4] Although the Senate version of the 1943 amendments contained an exception to the jurisdictional bar for suits brought by relators who were the "original source" of the government's information, that provision was dropped from the enacted version without explanation. S. Rep. No. 345, 99th Cong., 2d Sess. 12 (1986).

bring the suit itself based on the information in its possession. In the 1980s, Congress concluded that the absolute bar against *qui tam* suits based on information already in the federal government's possession precluded an unduly broad range of potentially valuable suits. See *Springfield Terminal Ry.*, 14 F.3d at 650-651.

In 1986, as part of a broader reform of the FCA, Congress replaced the government-knowledge bar with the present Section 3730(e). Current Section 3730(e)(4)(A) encompasses *qui tam* suits based on information that the government has publicly disclosed in the course of investigating, exposing, prosecuting, or otherwise pursuing the allegations of fraud. That provision is best understood as Congress's effort to identify the types of disclosures that evidence a likelihood that the federal government is already acting, or likely to act, on the alleged fraud. At the same time, Congress carved out an exception to the bar for situations in which the relator was the "original source" of the information about the fraud.

The legislative history of the 1986 FCA amendments confirms that the governmental proceedings referred to in the "public disclosure" bar are exclusively federal. Although the amendments were directed at narrowing the then-existing bar, which encompassed all suits based on knowledge possessed by the federal government, Congress did not intend to alter the bar's exclusive focus on whether the *federal* government is able to pursue the fraud unaided by a *qui tam* relator.

The uniquely federal focus of the amendment is demonstrated by the text of the original House and Senate bills. The bill reported by the House Judiciary Committee would have barred *qui tam* actions that are (1) "based on specific evidence or specific information which

the Government disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding," (2) "based on specific information disclosed during the course of a congressional investigation," or (3) "based on specific public information disseminated by any news media." H.R. Rep. No. 660, 99th Cong., 2d Sess. 42 (1986) (proposed 31 U.S.C. 3730(b)(5)(A)). The term "administrative * * * proceedings" in that bill, linked as it was to the provision's reference to "information which the Government disclosed," could have meant only federal administrative proceedings. The bill passed by the House of Representatives contained this provision. See 132 Cong. Rec. 22,330, 22,331, 22,345 (1986).[5]

The bill reported by the Senate Judiciary Committee contained a parallel, though differently worded, provision. It stated that a person could not bring a *qui tam* action "within six months of the disclosure of specific information relating to such allegations or transactions in a criminal, civil, or administrative hearing, a congressional or Government Accounting Office report or hearing, or from the news media." S. Rep. No. 345, 99th Cong., 2d Sess. 43 (1986) (proposed 31 U.S.C. 3730(e)(4)). Although the Senate bill broadened the House bar by making it applicable regardless of who had made the disclosure during the governmental proceeding, the focus on federal proceedings remained, as evidenced by the reference to congressional or GAO reports.

After the Senate bill was reported, the Senate adopted a substitute version of the bill. See 132 Cong. Rec.

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[5] The House bill contained an exception for situations in which "the Government" was aware of the information for at least six months before the relator filed suit but did not initiate a civil action within that period. H.R. Rep. 660 at 42-43 (proposed 31 U.S.C. 3730(b)(5)(B)).

at 20,530. That provision contained a "public disclosure" bar that was identical for present purposes to 31 U.S.C. 3730(e)(4) as finally enacted. See 132 Cong. Rec. at 20,531 (proposed 31 U.S.C. 3730(e)(5)). The legislative history "contains no hint of any intention to sweep local [or state] government sources of information into the jurisdictional bar through the addition of the word 'administrative.'" *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc.* v. *Westchester County*, 495 F. Supp. 2d 375, 383 (S.D.N.Y. 2007). To the contrary, in describing the substitute bill's *qui tam* provisions, Senator Grassley, the principal sponsor, explained that "the term 'Government' in the definition of original source"—*i.e.*, in that definition's requirement that the relator must have voluntarily informed "the Government" of the allegations prior to suit—"is meant to include any Government source of disclosures cited in [Subsection (4)(A)]; that is Government includes Congress, the General Accounting Office, any executive or independent agency as well as all other governmental bodies that may have publicly disclosed the allegations." 132 Cong. Rec. at 20,536 (Statement of Sen. Grassley).

Paragraph (B) was later amended again, so that the relator was no longer required to have disclosed to the Government or the media the allegations that were then publicly disclosed. See *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457, 470-471 (2007); 31 U.S.C. 3730(e)(4)(B). Senator Grassley's explanation makes clear, however, that Paragraphs (A) and (B) in Section 3730(e)(4) are to be read together and that the public disclosure bar in Paragraph (A) is triggered only by a disclosure made by a component of the *federal* "Government" referred to in Paragraph (B). As discussed above, see pp. 18-19, *supra*, that interpretation is also consis-

tent with the focus of the bill passed by the House, which was expressly limited to "information which the Government disclosed" in one of the enumerated governmental fora. H.R. Rep. 660 at 42 (proposed 31 U.S.C. 3730(b)(5)(A)).

2. Construing the "public disclosure" bar as limited to disclosures in federal proceedings furthers Congress's purpose "to encourage more private enforcement suits," S. Rep. 345 at 23; see *Chandler*, 538 U.S. at 133 (explaining that the 1986 FCA amendments "enhanced the incentives for relators to bring suit"), whereas petitioners' interpretation would disserve that purpose. In replacing the prior government-knowledge bar with current Section 3730(e)(4), Congress narrowed the scope of the bar by "allow[ing] private parties to sue even based on information already in the Government's possession." *Ibid.*; see *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 950 (1997) (1986 amendments "permitt[ed] actions by an expanded universe of plaintiffs"). Interpreting Section 3730(e)(4)(A) to encompass state and local reports, however, would significantly *expand* the jurisdictional bar, precluding *qui tam* suits based on information that has never been in the federal government's possession and that is unlikely to come to its attention, even though such suits could have gone forward under the pre-1986 version of the statute. "Because the federal government is unlikely to learn about state and local investigations," construing the public disclosure bar to encompass state and local reports would "discourage private actions that the federal government is *not* capable of pursuing on its own, thus frustrating rather than furthering the goals of the FCA." Pet. App. 36a.

Against this background, Category 2 in Section 3730(e)(4)(A) is properly construed, consistent with the most natural reading of its text, as limited to federal reports, hearings, audits, and investigations. That interpretation better serves the "twin goals" (*Springfield Terminal Ry.*, 14 F.3d at 651) of Section 3730(e)(4)—*i.e.*, promoting *qui tam* actions alleging possible fraud that the federal government is not publicly pursuing and may be unaware of, while precluding relator actions when the government is already on the way toward prosecuting its own suit. While federal inquiries and their outcomes are readily available to Department of Justice attorneys, many state and local reports and investigations never come to the attention of federal authorities. See Pet. App. 35a-36a. And even when such materials *are* provided to the federal government, their mere presence in federal files does not suggest that federal officials are actively investigating or likely to investigate the matters they cover. Barring suits by relators based on disclosures from state and local sources would therefore frustrate Congress's effort to strike an appropriate balance between encouraging private citizens to expose fraud unknown to or unaddressed by the federal government and preventing suits by would-be relators who add nothing to the government's own enforcement efforts.

Construing Section 3730(e)(4)(A) as encompassing state and local government reports is particularly problematic where, as here, the county is both the source of the purported disclosure and a defendant in the *qui tam* suit. If the Crisp Hughes Report were to qualify as a public disclosure, Graham County would effectively have shielded itself from a *qui tam* action. As the Third Circuit has noted, "[i]f state and local government reports were treated as administrative reports under the Act,

the jurisdictional bar might be invoked through information submitted by those bent on convincing a federal agency that no fraud, in fact, was occurring." *Dunleavy*, 123 F.3d at 745. That result would frustrate the FCA's core purpose.

C. Petitioners' Contrary Arguments Are Unpersuasive

1. Petitioners contend (Br. 13) that "[t]he word 'administrative' is neither vague nor ambiguous," but rather "is commonly understood to refer to both state and federal administrative proceedings." But this argument, as noted earlier, ignores the context in which this word appears. The canon that individual terms should be construed in light of their larger statutory context exists precisely to exclude interpretations that, while literally sound, make no sense in light of a statute's other terms and purposes. In *Gutierrez*, for example, the Court held that the term "any election" did not encompass the "general election" of which the relevant gubernatorial election was a part, see 528 U.S. at 254-255; yet the general election obviously was an "election" within any literal understanding of that word.

Indeed, petitioners themselves do not embrace the broadest meaning of the word "administrative" that the word will literally bear. The first definition of the term "administration" in the dictionary on which petitioners rely (Br. 17-18) is "[t]he act or process of administering, especially the management of a government *or large institution*." *American Heritage Dictionary of the English Language* 22 (4th ed. 2006) (emphasis added); see *ibid.* (giving as definition 3.b, "The group of people who manage or direct an institution, especially a school or college."). Petitioners do not contend, however, that the "administrative" reports and audits referenced in

Section 3730(e)(4)(A) include reports and audits prepared in connection with the management of large private institutions. Presumably petitioners recognize that Congress did not intend to allow the administrators of private hospitals and universities, frequent participants in federal programs and frequent defendants under the FCA, to shield themselves from *qui tam* liability by conducting audits or issuing reports that describe and then attempt to refute allegations of fraud. Petitioners may also recognize that their preferred definition of "administration" ("The activity of a government or state," Pet. Br. 18) better accords with Section 3730(e)(4)(A)'s overall focus on *governmental* proceedings than does a definition that would sweep in private entities. But once petitioners effectively concede that the word "administrative" cannot be construed in isolation, the game is up, because the contextual factors that give meaning to Category 2 show that it is limited to *federal* reports and audits.

2. Petitioners argue (Br. 25-26) that, rather than treating Category 2 as a distinct statutory unit, in which the word "administrative" is sandwiched between two distinctly federal terms, the Court should regard Section 3730(e)(4)(A) as identifying seven separate sources of public disclosure, five of which are not "uniquely federal." That contention disregards the statutory structure, which separates the sources of public disclosure into three distinct categories.

Under Section 3730(e)(4)(A), public disclosures will bar a *qui tam* action, except by an original source, if the disclosures are made "*in* a criminal, civil, or administrative hearing, *in* a congressional, administrative, or Government Accounting Office [(GAO)] report, hearing, audit, or investigation, or *from* the news media." 31 U.S.C.

3730(e)(4)(A) (emphases added). Each of the italicized prepositions introduces a distinct category of disclosures (the first two governmental and the third non-governmental), and each adjective in Section 3730(e)(4)(A) modifies the noun or nouns within its own category. Category 2, which is set off in the statutory text as an independent group, has an undisputed federal character, regardless of what meaning might be attributed to the other categories.

a. Petitioners argue (Br. 32-33) that Category 1 in Section 3730(e)(4)(A) includes disclosures in state as well as federal "criminal, civil, or administrative hearing[s]," and they further contend that the "administrative * * * report[s], hearing[s], audit[s], [and] investigation[s]" referenced in Category 2 must likewise include state administrative proceedings. But, as noted, the three categories are separated both by grammar and subject matter. There is consequently no need for the first category (which refers to adjudicative proceedings) and the second category (which refers to legislative and executive investigations) to have a similar scope.

In any event, if petitioners are correct to argue that treating one category as encompassing non-federal sources and the other category as excluding them would be anomalous, the solution would lie not in expanding the coverage of Category 2, but in limiting the coverage of Category 1. Category 2, after all, contains the more explicit textual evidence of Congress's intent: as explained above, see pp. 11-12, *supra*, the adjectives "congressional" and "[General] Accounting Office" in that phrase strongly suggest that the sandwiched adjective "administrative" refers only to federal administrative reports. Understanding Category 2 as conferring meaning on Category 1, rather than the reverse, would be

consistent with the text, history, and purposes of Section 3730(e)(4) and the FCA as a whole. The scope of Category 1 would then be consistent not only with Category 2's federal focus but with the federal focus of Section 3730 and the FCA as a whole. In particular, Category 1 then would comport with the reference in Section 3729(a) to a "criminal prosecution, civil action, or administrative action * * * *under this title*," 31 U.S.C. 3729(a)(C) (emphasis added), which refers to administrative hearings involving the federal government.[6]

b. Petitioners argue (Br. 33-34, 42-43) that it would be anomalous to bar *qui tam* suits based on public disclosures by the "news media"—Category 3 within Section 3730(e)(4)(A)—while allowing suits based on public disclosures in state administrative reports to go forward. In making this argument, petitioners appear to take the view that one public disclosure is much like any other. But Congress adopted a different approach. If Congress had wished to bar all *qui tam* suits that are based on publicly-disclosed information, it could easily have done so. But Congress chose instead to limit Section 3730(e)(4)(A) to specified categories of public disclosure, and the disclosures from non-governmental entities included in Category 3 are different in kind from the

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[6] The court of appeals stated that its divergent interpretations of Categories 1 and 2 (treating only the second as exclusively federal) avoided what would otherwise be a redundancy in the statute's reference in both phrases to administrative hearings. There is, however, no redundancy. Category 1—"criminal, civil, or administrative hearing[s]," 31 U.S.C. 3730(e)(4)(A)—refers to adjudicative proceedings, whereas Category 2—"congressional, administrative, or [GAO] report[s], hearing[s], audit[s], or investigation[s]," *ibid.*—refers to legislative or oversight proceedings, such as an administrative rule-making proceeding or an investigation carried out by an agency's inspector general.

governmental disclosures covered by Categories 1 and 2.

As explained above, the 1986 FCA amendments were intended to expand the class of *qui tam* suits that could go forward, while continuing to preclude suits (except those brought by an "original source") when the federal government already was, or was likely to be, on the trail of the fraud. In drafting Section 3730(e)(4)(A), Congress sought to identify the specific categories of public disclosures that provide the greatest assurance that federal officials are pursuing, or are likely to pursue, the fraud and that the assistance of *qui tam* relators is therefore unnecessary. A media disclosure—because of its widely dispersed nature—can generally be expected to come to the federal government's attention when it concerns fraud on the federal fisc. Indeed, media exposés are often part of an effort to urge the government into action.[7]

By contrast, publicly-disclosed allegations of fraud in state and local administrative reports neither suggest that a federal inquiry is already ongoing nor are likely to serve as a spur to federal action. A "public disclosure" of a governmental fraud investigation occurs whenever that investigation is disclosed to even a single "stranger to the fraud" outside the government, at least so long as the outsider is not precluded from further disseminating the information. See, *e.g.*, *United States ex rel. Fine* v. *MK-Ferguson Co.*, 99 F.3d 1538, 1545

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[7] Petitioners hypothesize (Br. 33) disclosures of fraud in local media of limited circulation. The Court need not decide in this case on the outer limits of the phrase "news media." Petitioners underestimate the degree to which local stories, if in fact newsworthy, may gain wider circulation, as they are picked up by larger media entities or spread through the internet.

(10th Cir. 1996); *United States ex rel. Fine* v. *Advanced Sciences, Inc.*, 99 F.3d 1000, 1005-1006 (10th Cir. 1996); *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 322-323 (2d Cir. 1992); see also *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 109 (1980) ("as a matter of common usage," the term "public disclosure" under the Consumer Product Safety Act, 15 U.S.C. 2051 *et seq.*, includes disclosure to FOIA requester).[8] If the investigation so disclosed is being conducted by the federal government, then application of the "public disclosure" bar serves Congress's purposes: such a disclosure indicates that the federal government is already on the trail of the alleged fraud. But if the investigation is conducted by a local or state governmental entity, its disclosure to a single member of the public neither signals that federal anti-fraud efforts are already ongoing nor provides assurance that the federal government is likely to become aware of the fraud. Under these circumstances, application of the public disclosure bar would frustrate, rather than further, Congress's purpose.[9]

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[8] But cf. *United States* v. *Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), overruled on other grounds by *Glaser* v. *Wound Care Consultants, Inc.*, 570 F.3d 907 (7th Cir. 2009). In *Bank of Farmington*, the Seventh Circuit disagreed with the Tenth Circuit's statement that a disclosure of fraud allegations "to any member of the public not previously informed thereof" constitutes a "public disclosure," and adopted instead as its test whether the disclosure was "likely to alert the authorities about the alleged fraud." 166 F.3d at 861-862 (citing *Advanced Sciences*, 99 F.3d at 1006).

[9] The anomalous result that local governments would be able to shield themselves from *qui tam* suit by disclosure to a narrow audience is exacerbated in light of the majority rule in the courts of appeals (with which the United States agrees) that a *qui tam* action is "based upon" the allegations in the public disclosure whenever "the relator's complaint describes allegations or transactions that are substantially

3. Petitioners contend (Br. 4-5, 35) that, because the Single Audit Act of 1984 (SAA), 31 U.S.C. 7501, *et seq.*, requires covered recipients of federal awards to submit audits to the federal government, state and local administrative reports and audits like those at issue here are likely to come to the federal government's attention. Petitioners' reliance on the SAA is misplaced.

Like their "plain text" argument, petitioners' invocation of the SAA proves too much. The SAA covers not only state and local governmental recipients of federal awards, but also "nonprofit organization[s]," including not-for-profit corporations operated for "scientific, educational, [or] service * * * purposes in the public interest." 31 U.S.C. 7501(a)(13) and (14); 31 U.S.C. 7502(a)(1)(A). If submission of reports to the federal government pursuant to the SAA triggered the application of Section 3730(e)(4)(A), administrative reports by private nonprofit universities and hospitals would qual-

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similar to those already in the public domain," *Glaser* v. *Wound Care Consultants, Inc.*, 570 F.3d 907, 910 (7th Cir. 2009), and there is no requirement that the relator have derived her allegations from the public disclosure. The Fourth Circuit is now the only court of appeals that limits Section 3730(e)(4)(A) to situations in which the relator "*actually derived*" the allegations in her complaint from the publicly disclosed documents. *Ibid.*; see *United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339, 1349, cert. denied, 513 U.S. 928 (1994); Pet. App. 40a-41a. This Court need not resolve that circuit conflict in order to decide the question presented in this case. Although the court of appeals did not regard the district court as having made an explicit factual finding that respondent's complaint was "based upon" the Crisp Hughes Report under the Fourth Circuit's more restrictive standard, *id.* at 41a, the district court did note evidence that respondent had access to the report, and it stated that respondent "has relied on this document," *id.* at 96a. Thus, her complaint would appear to be "based upon" the Crisp Hughes Report under either construction of that phrase.

ify, and these entities too could potentially shield themselves from *qui tam* suits.

Moreover, the SAA covers only a small subset of the state and local government reports and audits that would be encompassed by the "public disclosure" bar under petitioners' interpretation. The SAA covers only formal audits "conducted by an independent auditor in accordance with generally accepted government auditing standards," 31 U.S.C. 7502(c), and applies only to grantees that expend $500,000 or more in federal funds in any fiscal year. 31 U.S.C. 7502(a)(1)(A) ($300,000 threshold); 68 Fed. Reg. 38,401 (2003) (threshold increased to $500,000 beginning in 2004). The vast majority of administrative investigations, audits, or reports conducted by state and local governments therefore would not be covered by the SAA.[10]

More fundamentally, petitioners' argument based on the SAA is inconsistent with the purpose of the 1986 FCA amendments. The premise of petitioners' argument is that if documents containing information suggestive of fraud are provided to the federal government, no *qui tam* action should be allowed. In amending the FCA in 1986, however, Congress eliminated the prior government-knowledge bar. A state administrative report covered by the SAA may be provided to a federal government agency and placed on an internet clearinghouse without triggering any alarm bells within the federal government or otherwise spurring a federal investi-

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[10] The Crisp Hughes Report itself may fail to qualify as an audit for purposes of the SAA. Compare, *e.g.*, 31 U.S.C. 7502(c) (requiring that SAA audits conform to "generally accepted government auditing standards") with J.A. 122 (observing that procedures used to prepare the Crisp Hughes Report "do not constitute an audit made in accordance with generally acceptable auditing standards").

gation. See *Dunleavy*, 123 F.3d at 745-746 (refusing to hold that local government's grantee report to the Department of Housing and Urban Development was a public disclosure because "expansion of the FCA's definition of 'administrative report' to state and local government reports would in effect return us to the unduly restrictive 'government knowledge' standard" that Congress rejected in the 1986 FCA amendments). Especially given the vague and summary nature of many of those reports, their filing does not so alert the federal government of fraud as to raise the bar to *qui tam* actions.

4. Petitioners also rely (Br. 20) on 31 U.S.C. 3733(*l*)(7)(A), which contains an isolated reference to "administrative" hearings in a context indicating that state hearings are included. Under 31 U.S.C. 3733(a)(1), the Attorney General may issue civil investigative demands for materials obtained in other proceedings, including, *inter alia*, materials obtained by discovery "in any judicial or administrative proceeding of an adversarial nature," whether state or federal. 31 U.S.C. 3733(*l*)(7)(A). But petitioners offer no reason to extrapolate from Section 3733(*l*)(7)(A)'s coverage to the construction of the public disclosure bar that they propose.[11] Unlike the reference to "administrative * * * report[s] [and] audit[s]" in the public disclosure provision, the reference to "any * * * administrative proceeding" in Section 3733(*l*)(7)(A) is not sandwiched between two

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[11] This Court has previously declined to assume that the definition of a term for purposes of the civil investigative demand provision also applies to the other provisions of the FCA. See *Stevens*, 529 U.S. at 783-784 & n.13 (noting that the term "person" is defined to include States for purposes of civil investigative demands but does not include States for purposes of *qui tam* liability).

clearly federal terms. Nor does it serve to identify circumstances in which federal officials are already investigating the fraud or likely to do so. To the contrary, Congress enacted Section 3733 precisely because it recognized that the information to be acquired through civil investigative demands, including information revealing fraud on the federal fisc, might otherwise be *unavailable* to the federal government. *United States* v. *Markwood*, 48 F.3d 969, 983-984 (6th Cir. 1995). If Section 3733 is relevant at all, it is as a reminder that the federal government does not have such easy access to state and local administrative materials as to render unnecessary all *qui tam* actions based upon them. Petitioners' arguments on this score, like its others, mistake the meaning and purpose of the public disclosure bar.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2009

AMICUS CURIAE BRIEF

No. 08-304

IN THE

Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties under law. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for amici. In particular, Counsel of Record for amicus has argued twelve times before this Court, most recently in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).

ACLJ attorneys currently represent a *qui tam* relator in a False Claims Act (FCA) suit in California. The case is pending in the Ninth Circuit. *See Gonzalez v. Planned Parenthood of Los Angeles, et al.*, No. 09-55010 (9th Cir.). The whistleblower relator in that case is a former employee of a Planned Parenthood (PP) affiliate in Los Angeles who alleges that PP affiliates in California illegally overbilled the state (and through the state, the federal government) to the tune of over $100 million dollars. (Official investigations, in California and elsewhere, have reached similar conclusions regarding PP affiliates. A 2004 California Department of Health Services audit report, issued months after PPLA fired the relator, found over $5.2 million dollars in overbilling, over roughly a one-year period, at a single PP affiliate alone. More recently, the Washington State Department of Social and

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[1] The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

Health Services, on July 20, 2009, found in excess of $600,000 in improper billing by Planned Parenthood of the Inland Northwest in Spokane.)

The district court in the *Gonzalez* case dismissed the suit under the jurisdictional bar of the FCA. Several of the issues on appeal in *Gonzalez* coincide with the issues before this Court in the present case.

Accordingly, the ACLJ files this amicus brief to urge this Court to embrace the correct interpretation of the FCA's jurisdictional bar.

SUMMARY OF ARGUMENT

The federal False Claims Act (FCA) authorizes private parties to sue to recover (and to receive a portion of) funds obtained in violation of the FCA. 31 U.S.C. § 3730(b). However, the FCA denies subject matter jurisdiction -- and thus bars private civil actions -- in certain cases of "public disclosure" of the alleged fraud, unless the person bringing the suit is an "original source" of the information. § 3730(e)(4). Not all "public disclosures" count, however. The FCA specifically enumerates which particular types of disclosures can trigger the "public disclosure" bar. § 3730(e)(4)(A). The precise question here is whether a disclosure in an "administrative . . . audit, or investigation," *id.*, refers exclusively to disclosure by *federal* administrative bodies. The answer is "yes."

The text, legislative history, and statutory purposes of the FCA all decisively show that, aside from the news media, only *federal* sources of disclosures can qualify under the FCA's "public disclosure" bar.

The disclosure sources enumerated in § 3730(e)(4)(A) have their antecedents in parallel, sometimes even

identical, language in §§ 3729 and 3730(d) of the FCA. These antecedents are exclusively federal references; hence, the references in § 3730(e)(4)(A) are sensibly read to be likewise federal in nature.

The lead sponsors of the 1986 FCA amendments -- which created the public disclosure provisions -- expressly embraced this same understanding. Moreover, this understanding squares with the purpose of the 1986 FCA amendments. Those amendments sought to expand the availability of *qui tam* suits by abolishing the previous *"federal* government knowledge" bar and replacing it with a more limited bar. To read those same amendments as having imposed expansive new obstacles to *qui tam* suits based upon *state and local* government actions would be nonsensical.

Petitioners and their amici offer no persuasive arguments to the contrary.

That the pertinent information may be available to the federal government is irrelevant, since Congress abolished the "government knowledge" standard with the 1986 FCA amendments.

That the term "administrative," read literally, could include state and local administrative bodies proves too much, as a literal reading would also include *private* administrative bodies. Rather, the pertinent language must be read in context, not in isolation.

That the term "administrative" is used twice in § 3730(e)(4)(A) creates no inconsistency because both uses are exclusively federal.

Finally, the supposed "anomalies" that petitioners point to do not exist. *Qui tam* actions play a valuable role in augmenting federal enforcement of the FCA, including when such actions are based upon state and

local audits or reports *not* disclosed by the news media. Indeed, ferreting out under-the-radar frauds is one of the main goals of *qui tam* suits. Petitioners and their amici raise other complaints addressed, not to the scope of the FCA jurisdictional bar, but rather to other features of the FCA or of state FOIA laws. Those complaints provide no warrant for distorting the text of the FCA jurisdictional bar.

ARGUMENT

This case poses the question whether certain state and local government disclosures (in particular, audits) qualify as enumerated sources of "public disclosures" under the FCA. More precisely, since public disclosures in the "news media" *do* trigger the FCA jurisdictional bar, the question here is whether *low-profile, under-the-radar* state or local government disclosures bar private enforcement actions (absent "original source" status) under the FCA.

As discussed herein, aside from the "news media," *all* of the disclosure sources listed in the FCA are *federal* in nature. Thus, absent public disclosure of the pertinent state and local materials in the news media, *state and local* government disclosures do not -- standing alone -- trigger the FCA jurisdictional bar any more than would a *private* corporation's self-generated audit or report.

To understand this issue, it is helpful first briefly to consider the history and operation of private civil actions under the FCA.

History and Operation of FCA *Qui Tam* Suits

"The FCA establishes a scheme that permits either the Attorney General, [31 U.S.C.] § 3730(a), or a private party, § 3730(b), to initiate a civil action alleging fraud on the Government. A private enforcement action under the FCA is called a *qui tam* action, with the private party referred to as the 'relator.'" *U.S. ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230, 2233 (2009) (citation omitted).

The FCA was "enacted in 1863 with the principal goal of stopping the massive frauds perpetrated by large private contractors during the Civil War." *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 781 (2000) (internal quotation marks, editing marks, and citation omitted). This original version of the FCA contained a *qui tam* provision allowing *any* person to sue as a relator. *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 540 (1943). The *Marcus* case provided an extreme example: even individuals who allegedly had "contributed nothing to the discovery of [the fraud]" but had merely lifted information from a "previous indictment," nevertheless could be *qui tam* relators. *Id.* at 545.

In response to *Hess*, Congress amended the FCA in 1943, removing jurisdiction over *qui tam* actions "whenever . . . such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." 31 U.S.C. § 232(C) (1946). *See Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 945 (1997) ("At that time, the FCA required a district court to dismiss a *qui tam* action based on evidence or information the Government had when the

action was brought") (editing marks and citation omitted).

The 1943 FCA amendment, however, went too far in the opposite direction, depriving courts of jurisdiction over *qui tam* suits in which the would-be relators had provided their information to the government before filing their claims. Most notoriously, in *U.S. ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), the court of appeals "refused to allow the State of Wisconsin to act as a *qui tam* relator in a Medicaid fraud action even though the investigation had been conducted solely by the State," merely because the state had disclosed the frauds -- as required by federal law -- to the federal government. S. Rep. No. 99-345, at 12-13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5277-78. *See also* S. Rep. No. 110-507, at 3 (2008) (discussing the False Claims Act Correction Act of 2008, one of the predecessor bills to the recently enacted FCA amendments, *see infra* note 3) ("the 'government knowledge bar' . . . significantly limited the number of FCA cases that were filed," rendering the FCA "no longer a viable tool for combating fraud against the Government").

Congress responded by abolishing the federal "government knowledge" bar, replacing it with a more limited, tailored, "public disclosure" bar. "Congress amended the FCA in 1986 . . . to permit *qui tam* suits based on information in the Government's possession, except where the suit was based on information that had been publicly disclosed and was not brought by an original source of the information." *Hughes Aircraft*, 520 U.S. at 946 (citation omitted). *See* S. Rep. No. 99-345, at 23-24, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-89 ("The Committee's overall intent in amending

the *qui tam* section of the False Claims Act is to encourage more private enforcement suits").

These 1986 amendments added the "public disclosure" and "original source" provisions to the FCA. The current jurisdictional provisions relevant to this case provide as follows:

Public Disclosure Provision

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

§ 3730(e)(4)(A).

Original Source Provision

> For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

§ 3730(e)(4)(B).

Under these provisions, the question is no longer what information the federal government possesses,

much less has access to. Rather, there is a two-step inquiry that, as explained below, gauges the relator's *contribution to enforcement* of the FCA. The first question is whether a "public disclosure" bar applies to relator's suit. If so, then the second question is whether the relator meets the "original source" exception to that bar. This second step -- original source analysis -- is only necessary if there has been a public disclosure. If there has been no "public disclosure," then the relator need not be an "original source."

I. THE SOURCES OF PUBLIC DISCLOSURE ENUMERATED IN THE FALSE CLAIMS ACT ARE ALL (ASIDE FROM "NEWS MEDIA") FEDERAL IN NATURE.

The text, history, and purpose of the FCA all demonstrate that the sources enumerated under the public disclosure bar of the FCA, with the sole exception of the "news media," must all be *federal sources*.

A. Statutory structure and context

"Statutory language must be read in context and a phrase gathers meaning from the words around it." *Jones v. United States*, 527 U.S. 373, 389 (1999) (internal quotation marks and citation omitted). As petitioners concede, "federal courts have a 'duty to construe statutes, not isolated provisions.'" Pet'r Br. at 27 (quoting *Gustafson v. Alloyed Co.*, 513 U.S. 561, 568 (1995)). The FCA is a statutory whole, and viewed in

its entirety, the logic for an exclusively federal meaning to the term "administrative"[2] -- indeed, to all of the non-media disclosure sources listed in the FCA's jurisdictional provision -- is compelling.

Section 3729,[3] which immediately precedes § 3730 (the *qui tam* section), sets forth civil penalty provisions under the FCA. This section spells out the circumstances under which an offender who cooperates with the government faces reduced liability. The offender, for example, must furnish all information about the violation to the government within 30 days

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[2] As the court below reasoned in interpreting the phrase "administrative . . . audit" in § 3730(e)(4)(A), the federal nature of that particular reference appears from its immediate placement. The term "administrative" is sandwiched between two exclusively federal terms: "in a *congressional*, administrative, or *Government Accounting Office* report, hearing, audit, or investigation," § 3730(e)(4)(A) (emphasis added). Thus, this placement strongly suggests that the term "administrative" refers to federal administrative agencies.

Petitioners counter that this Court must look not to the particular *phrase* where the term "administrative" appears, but rather to the pertinent *subsection*. Petitioners' proposal, however, is arbitrarily narrow. To understand the relevant terms of the FCA, this Court should look as well to the *adjacent sections and subsections* of the FCA. As explained in the text, these neighboring provisions are powerful indicators of the meaning of the jurisdictional provisions.

[3] The FCA was amended by a bill signed into law on May 20, 2009. Fraud Enforcement and Recovery Act of 2009, Pub. L. 111-21, 123 Stat. 1617. The private *qui tam* section of the FCA, 31 U.S.C. § 3730, was not amended, with the exception of § 3730(h), the retaliation provision, which is not at issue here. The 2009 amendments to the FCA did not change the language of § 3729 quoted herein. This brief cites to the amended version.

of obtaining that information. § 3729(a)(2)(A). Hence, such an offender is a species of whistleblower. Importantly, this section adds the following condition:

> At the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation . . . .

§ 3729(a)(2)(C).

The phrase "criminal prosecution, civil action, or administrative action . . . commenced under this title with respect to such violation" and the term "investigation" in § 3729(a)(2)(C) parallel the phrase "criminal, civil, or administrative hearing" and the term "investigation" in the jurisdictional section, § 3730(e)(4)(A), and were presumably included for similar reasons, namely, to discount the value of a whistleblower who alerts the federal government about something it is already pursuing.

Notably, the text in § 3729 does not include the modifier "federal" before "criminal prosecution, civil action, or administrative action." Nevertheless, this phrasing clearly applies only to actions involving the United States, either directly or through a private relator, as only such suits can be commenced "under this title," *i.e.*, under the FCA. *Supra* p. 5. The term "investigation" likewise has no express "federal" modifier. Nevertheless, its exclusively federal reference follows both from the federal context of the remainder of subsection § 3729(a)(2)(C) and from the

parallel use of "investigation" in § 3730(c) (where the federal context is made explicit), described below.

This language from § 3729 is then carried forward into three separate subsections of § 3730.

First, the FCA in § 3730(c) authorizes a stay of certain discovery in a *qui tam* case where such discovery would interfere with "the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," § 3730(c)(4). This same subsection then employs the phrases "the criminal or civil investigation or proceedings" and "the ongoing criminal or civil investigation or proceedings" as synonyms for the "the Government's investigation or prosecution of a criminal or civil matter" already referred to in this subsection. *Id.* The references are thus all exclusively federal, though again, the specific modifier "federal" is not used.

Next, the FCA in § 3730(d) sets the parameters of an award to a *qui tam* relator in cases where "the Government" proceeds with the relator's suit. The statute caps the relator's share at 10% of the proceeds where the action is "based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media," § 3730(d)(1). This subsection echoes the similar language in § 3729(a)(2)(C) and § 3730(c). This subsection also closely tracks -- in large part, word-for-word -- the language in the subsequent jurisdictional provisions. As in the jurisdictional provisions, the text in § 3730(d)(1) does not use the

express modifier "federal," but in context the meaning is clear: where the federal government was already publicly pursuing the matter, and the relator was not an independent source of the information, the reward to the relator should be discounted.

Finally, the FCA includes virtually identical language in its jurisdictional subsection, § 3730(e)(4), set forth *supra* p. 7.

The phrasing in the jurisdictional provisions, then, is not a collection of isolated words bereft of context, but rather a continuation of phraseology employed (with minor wording) over the FCA as a statutory whole. This statutory context points compellingly to an interpretation of the sources enumerated in § 3730(e)(4) as referring to exclusively *federal* sources (with the exception of the "news media").

B. Legislative history

The legislative history matches this understanding. On Aug. 11, 1996, Senator Grassley, the lead Senate sponsor of the 1986 FCA amendments, offered a substitute amendment to S. 1562 (the bill that would ultimately pass). 132 Cong. Rec. 20530 (daily ed. Aug. 11, 1986). This substitute, while not identical to the version finally adopted, was nearly identical in its jurisdictional subsection. One difference was that the definition of "original source" linked the timing of the public disclosures to the Government filing an FCA action, rather than to the relator filing. Thus, this near-final version provided:

> (5)(A) No court shall have jurisdiction over an action under this section based upon the public

> disclosure of allegations or transactions in a criminal, civil, or administrative hearing, a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily informed the Government or the news media prior to an action filed by the Government.

132 Cong. Rec. 20531 (proposed § 3730(e)(5)). Addressing this provision, Sen. Grassley explained:

> The use of the term "Government" in the definition of original source is meant to include any Government source of disclosures cited in subsection (5)(A); that is, Government includes Congress, the General Accounting Office, any executive or independent agency as well as all other governmental bodies that may have publicly disclosed the allegations.

132 Cong. Rec. 20536. The Senate sponsor's comments plainly identify the term "administrative," in the phrase "congressional, administrative, or Government Accounting Office," as meaning "any executive or independent agency" of the capital "G," i.e., federal, "Government." In addition, these comments identify

"all other governmental bodies" involved in any hearing that produces a public disclosure as a "Government" -- i.e., federal -- "source of disclosure."

When the bill (S. 1562), now in its final form, came to the House floor, 132 Cong. Rec. 29315-20 (daily ed. Oct. 7, 1986), Rep. Berman of California, the principal House sponsor for the bill, included "legislative history for the Record," *id.* at 29321. That "legislative history" contained the following explanation of the jurisdictional provisions:

> The final bill has adopted the Senate version of who may file an action under the False Claims Act. Before the relevant information regarding fraud is publicly disclosed through various *government* hearings, reports and investigations which are specifically identified in the legislation or through the news media, any person may file such an action as long as it is filed before the *government* filed an action based upon the same information. Once the public disclosure of the information occurs through one of the methods referred to above, then only a person who qualifies as an "original source" may bring the action. A person is an original source if he had some of the information related to the claim which he made available to the *government* or the news media in advance of the false claims being publicly disclosed. This person has the right to bring an action after these disclosures are made public as long as it is filed before an action is commenced by the *Government*.

Id. at 29322 (emphases added). While the capitalization is inconsistent, it is clear that all

references to the government are to the federal, capital "G" government, and that the "various government hearings, reports and investigations which are specifically identified in the legislation" are exclusively federal in nature.

Both Sen. Grassley and Rep. Berman subsequently reaffirmed this understanding of the 1986 FCA amendment in a letter to Attorney General Janet Reno. In that letter, entered in the Congressional Record, the legislative sponsors stated unequivocally: "We did intend, and any fair reading of the statute will confirm, that the disclosure must be in a *federal* criminal, civil or administrative hearing. Disclosure in a *state* proceeding of any kind should *not* be a bar to a subsequent *qui tam* suit." 145 Cong. Rec. E1546 (daily ed. July 14, 1999) (emphasis added).

C. Statutory purpose

This Court has acknowledged in a prior FCA case "the conventional judicial duty to give faithful meaning to the language Congress adopted in light of the evident legislative purpose in enacting the law in question." *United States v. Bornstein*, 423 U.S. 303, 310 (1976). Reading the enumerated sources in § 3730(e)(4)(A) as exclusively federal furthers the purposes of the 1986 FCA amendments; by contrast, construing the sources to include state and local bodies would undermine those purposes.

> The basic purpose of the 1986 amendments was to make the FCA a more useful tool against fraud in modern times. Because Congress was concerned about pervasive fraud in all Government programs,

> it allowed private parties to sue even based on information already in the Government's possession, . . . and enhanced incentives for relators to bring suit.

Cook County v. U.S. ex rel. Chandler, 538 U.S. 119, 133 (2003) (internal quotation marks and citations omitted).

As noted earlier, the 1943 amendments to the FCA barred actions where the federal government was already in possession of the pertinent information. *See supra* pp. 5-6. Congress determined that this restriction posed too great of an obstacle to *qui tam* suits, and so Congress amended the FCA in 1986 to encourage more private actions. *Cook County*, 538 U.S. at 133. It therefore makes perfect sense that the 1986 amendments would *limit* the jurisdictional bar by replacing mere federal possession of the pertinent information with federal pursuit of the pertinent matter as the relevant trigger. To read the 1986 amendments as having *expanded* the jurisdictional bar, by adding a whole host of obstacles resting on *state and local* government activities, would be nonsensical. This would replace actual federal possession of information -- the 1943 version of the jurisdictional bar -- with merely deemed federal possession of information, an even more expansive bar to *qui tam* suits. To borrow from the *Cook County* case, "Congress could have done that, of course, but it makes no sense to suggest Congress did it under its breath." 538 U.S. at 133 (footnote omitted).

Even if Congress had perversely sought to smuggle a "knowledge" standard back into the FCA -- which it clearly did not -- charging the federal government with

implicit knowledge of state and local government acts is unrealistic.

> [A]s a practical matter, it is probably unrealistic to expect the federal government to be on notice of all information disclosed by the myriad of state and local administrative agencies, unless they are reported in the news media, in which case [the disclosures] would qualify as public disclosures under the Act. Therefore, allowing relators to base their *qui tam* actions upon state and local administrative materials may well be necessary to alert the federal government to frauds disclosed in state and local administrative forums.

Beverly Cohen, *Trouble at the Source: The Debates Over the Public Disclosure Provisions of the False Claims Act's Original Source Rule*, 60 Mercer L. Rev. 701, 740 (2009) (footnotes omitted). *Accord* 145 Cong. Rec. E1548 n.1 (daily ed. July 14, 1999) (letter of Sen. Grassley and Rep. Berman) ("Disclosure of fraud in a state court proceeding, even a state criminal proceeding, is unlikely to get the attention of the federal government, unless it is publicized in the news media, a contingency the public disclosure bar addresses"). The federal government simply cannot be presumed to be aware of every state or local audit, hearing, or investigation.

Moreover, treating state and local government disclosures as jurisdictional bars to private FCA suits would enable collusive state and local governments to defeat *qui tam* suits through careful, low key "disclosures." In a *qui tam* case in California, for example, certain state officials willingly catered to the

defendants by (1) halting further planned audits of the remaining defendant California affiliates, audits that presumably would have revealed additional tens of millions of dollars of unlawful overbilling; (2) excusing the $5 million dollars in overbilling that one limited audit of one particular defendant affiliate found; (3) declining to recoup the massive illegal transfer of taxpayer money to the defendants that was found; and, (4) changing the law to allow the affiliates to continue their hefty mark-ups at taxpayer expense. (All of this was accomplished apparently without any relevant public disclosure in the news media.) Government officials who are so willing to accommodate and shield the perpetrators of a massive taxpayer fraud are hardly likely to call the matter to the attention of the federal government.

The FCA should not be read to be self-defeating. The enumerated sources (aside from the news media) are exclusively federal, and hence state or local audits (and, for that matter, other state or local sources) do not qualify as an enumerated sources of public disclosures.

II. THE CONTRARY ARGUMENTS OF PETITIONERS AND THEIR AMICI ARE UNPERSUASIVE.

Petitioners and their amici press a number of arguments for reading the phrase "administrative audits" in the FCA's jurisdictional bar to include state and local government administrative audits. None of these arguments is persuasive.

A. Federal "possession" of information about the fraud is no longer the standard after the 1986 amendments to the FCA.

Petitioners emphasize that, on the facts of this case, federal officials already had knowledge of, or at least access to, information regarding the alleged fraud. Pet'r Br. at 4-5, 7-8, 43-44. *See also* States Br. at 9-10. It is true that, prior to the 1986 amendments to the FCA, federal "possession" of the relevant information barred private *qui tam* suits. *Supra* pp. 5-6. However, Congress abolished this standard with its 1986 amendments. *Supra* p. 6. It is therefore manifestly incorrect to assert, as do amici, that "[t]he idea behind" FCA *qui tam* claims "is that the government can effectively 'purchase' nonpublic information from relators in exchange for a share in the . . . recovery," States Br. at 3. Incentives for *qui tam* suits under the current version of the FCA purchase, not *information*, but *enforcement*.

Petitioners' argument is essentially an attempt to inject the federal government knowledge standard back into the FCA's jurisdictional bar; this attempt to resurrect the prior version of the FCA must therefore be rejected.

B. Reading the term "administrative" out of context is improper.

Petitioners insist that the modifier "administrative" must be read literally to include *all* administrative bodies, whether federal, state, or local.

This argument proves too much. Reading the term

"administrative" in strictly literal fashion would also sweep any *private* administrative "report, hearing, audit, or investigation" into the FCA's jurisdictional bar. Private universities have administrations, for example, and those administrations conduct investigations, hold hearings, and issue reports.[4] Private insurance companies, private accounting firms -- indeed, all manner of private businesses -- have administrations which conduct internal and external investigations, hold hearings, and issue reports and audits of varying kinds. Yet, not even petitioners, despite their insistence upon the "plain and readily understood meaning" of the text, take the position that *private* administrative reports, hearings, audits, or investigations qualify as potential sources of disclosure under the FCA's jurisdictional bar. Instead, petitioners read their own implicit modifier, "government," into the statutory language. Presumably petitioners would defend their insertion of an unexpressed modifier by arguing that the statutory terms must be read in the context of the statute as a whole. This is true -- but this same statutory context is precisely the reason why the enumerated sources (aside from the "news media") must be understood, not just as *governmental*, but as exclusively *federal governmental*. *Supra* § I(A).

Petitioners cite to a dictionary definition of "administrative" that includes the adjective "government." But one can as easily point to other dictionary definitions not so limited. *E.g.*, *Webster's Third Int'l Dictionary* 28 (1993) (defining

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[4] *E.g.*, www.princeton.edu/pr/pub/integrity/08/discipline/ (describing disciplinary process at Princeton University).

"administration" both as "the total activity of a state" *and* as "a body of persons who are responsible for managing a business or institution"; defining "administrative" as the adjectival form of "administration").

Petitioners cite to particular uses of the term "administrative" in the U.S. Code to refer to both federal and state bodies. Pet'r Br. at 18 & n.7. But the Code also uses the term "administrative" to refer to private entities. *E.g.*, 7 U.S.C. § 6614(b), (c); 15 U.S.C. §§ 77s(b)(1)(A)(i), (ii), 1692p(a)(2)(B); 20 U.S.C. §§ 1011a(c), 1062(7), 1092(6)(B).[5]

Petitioners argue that Congress could have put the word "federal" in front of "administrative" in the text of the FCA. Pet'r Br. at 21. Again, this proves too much. Congress also could have put the word "government" in front of "administrative." It did not, and for the same reason: such language would be redundant, as the context already clearly indicates that the term must be understood as an exclusively federal governmental reference.

In short, petitioners' (selective) resort to hyper-literalism does not provide a satisfactory interpretive device for understanding the jurisdictional bar of the FCA. Rather, the relevant provisions must read *in context*. As demonstrated *supra* § I(A), that context

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[5] Petitioners also cite to the use of the term "administrative" in 31 U.S.C. § 3733(l)(7) of the FCA. But § 3733 deals with "civil investigative demands" by the Attorney General (or his designee), not *qui tam* suits. The phrase in question, "any judicial or administrative proceeding of an adversarial nature," is not part of that chain of parallel phrases in §§ 3729-30 which give context to the FCA's jurisdictional bar. It is thus of little, if any, interpretive relevance to the question presented.

points to a reading of the sources enumerated in 31 U.S.C. § 3730(e)(4)(A), aside from the "news media," as being exclusively *federal* in nature.

C. There is no inconsistency in the use of "administrative" in § 3730(e)(4)(A).

Petitioners contend that the reference to an administrative "report, hearing, audit, or investigation" cannot be exclusively federal because the immediately preceding reference to an "administrative hearing" includes state and local administrative hearings. Pet'r Br. at 25-27, 32. But petitioners' premise is mistaken. The preceding reference to a "criminal, civil, or administrative hearing" is *also* exclusively federal, as explained *supra* § I. It is simply not true that "the vast majority of the items set out in the list are non-federal sources." Pet'r Br. at 28. To the contrary, *all* of the listed sources are federal, with the sole exception of the "news media." There is no inconsistency.

The United States argued as much in its brief in support of certiorari, as petitioners acknowledge. Pet'r Br. at 27. Petitioners offer no substantive response to the argument in support of this position. Indeed, petitioners' only response is to cite five lower court cases. *Id.* at 28. According to petitioners, each of these courts "considered" and "soundly rejected" "this argument" that the FCA reference to a "criminal, civil, or administrative hearing" is a reference to exclusively *federal* proceedings. *Id.* Closer inspection reveals, however, that four of the five cases petitioners cite did not even mention "this argument." The only case that did so, *A-1 Ambulance Serv., Inc. v. California*, 202

F.3d 1238 (9th Cir. 2000), rejected the argument on the basis that Congress "could have easily" inserted the modifier "federal" but "chose not to do so," *id.* at 1244. This argument fails for the reasons set forth *supra* §§ I, II(B). Indeed, the logical conclusion of the *A-1* court's faulty rationale would be to sweep *private* hearings into the FCA's jurisdictional bar as well, since Congress "could have easily" inserted the word "governmental" before administrative but "chose not to do so."

D. No supposed "anomaly" supports expanding the FCA's jurisdictional bar to include state and local government disclosures.

Petitioners contend that reading the FCA jurisdictional bar in accordance with the statutory text, structure, history, and purposes outlined above, *supra* § I, would "create anomalies" that require a different interpretation. This is not so.

1. "Parasitic" actions

Petitioners argue that if the jurisdictional bar is not read to apply to state and local government disclosures, this would permit "parasitic actions by strangers who have done nothing to facilitate a fraud investigation," which petitioners claim "undercuts the very purposes of the public disclosure bar." Pet'r Br. at 29.

There are multiple flaws in this contention.

First, as noted above, the overall intent of Congress in the 1986 FCA amendments was to *encourage more*

qui tam suits. *Supra* pp. 6, 7, 15.

Second, Congress deliberately chose not to bar FCA suits based upon any and all public disclosures; rather, only disclosures from certain enumerated sources count. Private relators can sue based upon any matter that has only been publicly disclosed by unenumerated sources. This is a description of the statute, not an argument for its reinterpretation. For example, even under petitioners' expansive view of the jurisdictional bar, relators can bring a *qui tam* action based upon the "public disclosures" of a private business or university. According to petitioner's logic, this creates an "anomaly." Not so. The statutory significance of various sources of public disclosures varies; this is simply the natural consequence of the choice, by Congress, to limit the universe of sources that can trigger the jurisdictional bar.

Third, the FCA jurisdictional bar will apply to all matters that the "news media" has publicly disclosed. Thus, *qui tam* relators who are not original sources will only be able to sue over matters that have *not* already been publicized in the press. Ferreting out such under-the-radar frauds is a major purpose of a *qui tam* suit.

Fourth, *pace* petitioners, there is considerable value to private attorney general actions, even where the matter is already "publicly disclosed." This Court recognized as much in *Hess*. *See* 317 U.S. at 545 (noting that relator brought an additional "net recovery to the government"). Common sense confirms that a federal government limited in money, manpower, and time cannot possibly pursue all frauds, even those it knows about. Indeed, even when a *qui tam* suit has been filed and the federal government has

been notified, the federal government frequently declines to take up the action. As one former Department of Justice attorney explained, "[t]here are many reasons why the government may not wish to intervene . . . . For instance, the government has previously declined out of a desire to preserve resources by allowing the relator to bear the brunt of litigation costs." Joel D. Hesch, *Understanding the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar" in Light of the Supreme Court's Ruling in Rockwell v. United States*, 7 DePaul Bus. & Com. L.J. 1, 16 (2008).

The whole point of allowing *qui tam* actions is to supplement federal enforcement with an army of private litigants: "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." S. Rep. No. 99-345, at 2, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267. Private enforcement does not "siphon off a portion of the government's recovery," Pet'r Br. at 30. Rather, private enforcement multiplies the government's recovery by expanding the breadth of enforcement.

> *Qui tam* statutes are passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

Hughes Aircraft, 520 U.S. at 949 (internal quotation and editing marks and citations omitted).

Like other offers of private bounties, FCA *qui tam* incentives yield a net gain to the government, as the government reaps large sums from the many recoveries it never could or would have pursued by itself. "All told, the 1986 Amendments have led the Government to recover over $20 billion since 1986, of which $12.6 billion has been the result of qui tam actions." S. Rep. No. 110-507, at 6 (2008).[6] Moreover, the government can increase its relative share of the recovery simply by proceeding with the *qui tam* action itself. 31 U.S.C. § 3730(d)(l), (2) (reducing range of awards to *qui tam* plaintiffs where government takes over the suit). And if the government is already suing over the fraud in question, *qui tam* suits -- which in that case really *would* be parasitic -- are totally barred. 31 U.S.C. § 3730(e)(3).

2. First-to-file rule

Petitioners lament that under the FCA, the studious "insider who has worked for years in gathering information" cannot sue if a "stranger to the fraud" files first. Pet'r Br. at 31. *See* 31 U.S.C. § 3730(b)(5). Petitioner's gripe, however, is not with the scope of the jurisdictional bar, but rather with the first-to-file rule. True, there is no "best plaintiff" rule under the FCA. But this is not irrational. Presumably Congress chose to place the premium on speed -- better to expose the

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[6] Tellingly, the United States -- the most interested party on this specific question -- did not complain in its amicus brief in support of certiorari that it would somehow be shortchanged by allowing *qui tam* suits in the present context.

fraud now, rather than wait for a plodding insider to conduct "years" of research -- instead of requiring a potentially messy determination of who is the "best plaintiff."[7]

3. Discouraging municipal self-audits

Petitioners argue that, if local governments can be sued on the basis of their own self-investigations, they will hesitate to conduct such investigations. Pet'r Br. at 31. (States and state agencies already cannot be sued in *qui tam* suits under the FCA. *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000).) This is a makeweight. Such self-investigations already generate the far more serious risk of federal civil penalties, and perhaps even criminal enforcement. And the "cottage industry" of "plaintiffs' attorneys" to which petitioners disparagingly refer is none other than the cadre of private attorneys general who supplement, at private expense (and thus benefit to taxpayers), the policing of federal fraud laws.

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[7] The arguments of some amici that state FOIA laws may interfere with state fraud investigations, States Br. at 11; Nat'l League of Cities Br. at 6-7, are similarly inapposite. States can remedy any such problems by modifying their FOIA laws to shield ongoing state investigations. There is no need to distort the FCA to save states from their own FOIA statutes.

The concerns of the Chamber of Commerce over the application of the FCA to situations other than overbilling, Chamber of Commerce Br. at 6-7, meanwhile, are more properly directed to the scope of the FCA itself, not to the jurisdictional provisions.

4. News media

Petitioners argue that it is anomalous have public disclosures from the news media trigger the jurisdictional bar but not public disclosures from state and local governments. Pet'r Br. at 33-34. Again, this is not an anomaly, but rather an exercise in legislative line-drawing. Petitioners could as easily find fault with Congress's choice not to list *private* administrative reports or audits that are publicly disclosed. Surely a publicly disclosed self-audit by Chrysler is more likely to gain federal official attention than a report in the Kankakee Daily Journal. Nevertheless, Congress has judged that, by and large, the purpose of exposing and pursuing frauds against the federal fisc is served sufficiently well by disclosures from *federal* and *media* sources to outweigh the need for *qui tam* actions by relators who are not original sources. That Congress reached a different judgment regarding state, local, and non-media private disclosures is not unreasonable. As petitioners concede, "'We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable,'" Pet'r Br. at 36 (quoting *Ali v. Federal Bureau of Prisons*, 128 S. Ct. 831, 841 (2008)).

CONCLUSION

This Court should affirm the judgment of the Fourth Circuit.

Respectfully submitted,

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October 26, 2009

AMICUS CURIAE BRIEF

Supreme Court, U.S.
SEP 3 - 2008

(14)

No. 08-304

In the Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN HEALTH CARE ASSOCIATION, THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND THE AMERICAN HOSPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether an audit and investigation performed by a State or its political subdivision constitutes an "administrative . . . report . . . audit, or investigation" within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

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INTEREST OF *AMICI CURIAE*

Amicus curiae the Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the United States.[1] A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the Nation's business community, including cases before this Court raising important questions under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733.

Amicus curiae American Health Care Association (AHCA) is the national representative of nearly 11,000 non-profit and proprietary facilities dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly and disabled citizens who live in nursing facilities, assisted living residences, subacute centers, and homes for persons with mental retardation and developmental disabilities. One way in which AHCA promotes the interests of its members is by participating as an *amicus curiae* in cases with far-ranging consequences for its members, including cases brought under the FCA that raise significant legal questions as to how the statute should be applied.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission. Letters communicating petitioners' and respondent's written consent to the filing of this brief have been filed with the Clerk.

Amicus curiae Pharmaceutical Research and Manufacturers of America (PhRMA) is an association whose membership comprises the Nation's leading research-based pharmaceutical and biotechnology companies. PhRMA members alone invested an estimated $50.3 billion in 2008 in discovering and developing new medicines that help patients live longer, healthier and more productive lives. PhRMA advocates for public policies that encourage discovery of important medicines for patients by pharmaceutical and biotechnology companies.

Amicus curiae American Hospital Association (AHA) is the national advocacy organization for hospitals in the United States. AHA represents approximately 5,000 hospitals, health care systems, and other health care organizations, as well as 37,000 individual members. AHA leads, represents, and serves health care organizations that provide care to their communities 24 hours a day, seven days a week, 365 days a year. One way in which AHA promotes the interests of its members is by participating as an *amicus curiae* in cases with important and far-ranging consequences for its members, including FCA cases.

The Chamber, AHCA, PhRMA, AHA and their respective members have a substantial interest in this case. The current version of the FCA provides a *qui tam* relator or the Federal Government with a cause of action against "[a]ny person" who, among other things, "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." Fraud

Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4(a)(1), 123 Stat. 1617, 1621 (to be codified at 31 U.S.C. § 3729(a)(1)(A), (B) (Supp. IV 2010)). No proof of specific intent to defraud is required to create liability under the FCA, as the term "knowingly" includes a person who, with respect to information, "acts in deliberate ignorance" or "in reckless disregard" of the "truth or falsity of the information." FERA § 4(a)(2), 123 Stat. at 1622 (to be codified at 31 U.S.C. § 3729(b)(1) (Supp. IV 2010)). Congress emphasized the FCA's lowered intent threshold earlier this year when it amended the FCA to abrogate this Court's unanimous holding in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008). *See* S. Rep. No. 111-10, at 10 (2009) (explaining that changes were designed to "clarify and correct" supposedly "erroneous interpretations of the [FCA] that were decided in *Allison Engine*). There, the Court held that specific intent was a required element under the former version of the FCA's false-statements and conspiracy provisions, 31 U.S.C. § 3729(a)(2) and (3) (2006). *Allison Engine*, 128 S. Ct. at 2130-31.

Despite the fact that specific intent is not a required element in FCA cases, the statute "imposes damages that are essentially punitive in nature." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000); *see also United States ex rel. Brensilber v. Bausch & Lomb Optical Co.*, 131 F.2d 545, 547 (2d Cir. 1942) (per curiam) (holding that the earlier, more lenient version of the FCA was "not only penal, but drastically penal"), *aff'd without opinion by an equally divided Court*, 320 U.S. 711 (1943). A defendant found liable under the current version of the FCA is subject to manda-

tory treble damages, civil penalties as great as $11,000 per claim, attorneys' fees and costs. FERA § 4(a)(1), 123 Stat. at 1622 (to be codified at 31 U.S.C. § 3729(a) (Supp. IV 2010)).[2]

A relator who brings an action under the FCA is entitled to share in any recovery with the United States. If the United States does not intervene to take over prosecution of the case, the relator receives a bounty of between 25 and 30 percent of the recovery. 31 U.S.C. § 3730(d)(2). If the United States intervenes, the relator's bounty is reduced to between 15 and 25 percent. § 3730(d)(1).

Because of the FCA's punitive nature and relaxed intent standard, *amici*'s interest in the proper application of the FCA is especially heightened in cases brought by *qui tam* relators, who are not subject to meaningful Executive Branch oversight and who may be "motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997); *see also Stevens*, 529 U.S. at 778 n.8 (reserving judgment on whether the FCA's *qui tam* provisions "violate Article II [of the United States Constitution], in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3").

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[2] On its face, the recently amended FCA provides for a per claim civil penalty of "not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 . . . ." FERA § 4(a)(1), 123 Stat. at 1622 (to be codified at 31 U.S.C. § 3729(a) (Supp. IV 2010)). The $5,000 and $10,000 amounts have been adjusted upward to $5,500 and $11,000, respectively. 28 C.F.R. § 85.3(a)(9) (2009).

In 1986, Congress acted to preclude *qui tam* litigation predicated on publicly disclosed information. The "public disclosure bar," as it is commonly known, provides that

> [n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office [sic] report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157 (codified at 31 U.S.C. § 3730(e)(4)(A)). Although Congress enacted substantial amendments to the FCA earlier this year, *see* FERA § 4, 123 Stat. at 1621-25, Congress chose not to amend the public disclosure bar.

The question of how to apply this "murky statute" (Pet. App. 32a) has plagued courts and litigants. *See, e.g.*, *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 470 (2007) (resolving circuit split on meaning of "original source" exception after observing that statutory question was "hardly free from doubt"); *United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 387 (3d Cir. 1999) (Alito, J.) (cataloging public disclosure bar's numerous textual shortcomings and reaching the "inescapable conclusion" that the statute "does not reflect careful drafting" or "precise use of language").

The question presented by this case—whether a report, audit or investigation performed by a State or

its political subdivision constitutes an "administrative . . . report, . . . audit, or investigation" within the meaning of the public disclosure bar—is of tremendous importance to *amici*'s members, many of whom are subject to regular and numerous inspections and audits by a wide variety of state and local government agencies. These audits and inspections generally assess an entity's compliance with certain complicated (and often confusing) statutory and regulatory requirements that may affect participation in government programs receiving federal funds. The results of these inspections and audits are usually made available to the public.

Relators, in turn, are increasingly using allegations of noncompliance with federal conditions of participation as the basis for FCA liability. *See, e.g.*, *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1220 (10th Cir. 2008) (describing relator's allegations based on hospital's supposed violation of Medicare and Medicaid conditions of participation); *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1169 (9th Cir. 2006) (allowing relator's suit based on university's alleged non-compliance with federal conditions of participation governing student-loan program even though federal agency in question treated noncompliance as an administrative enforcement matter, not fraud), *cert. denied*, 550 U.S. 903 (2007); *United States ex rel. Swan v. Covenant Care, Inc.*, 279 F. Supp. 2d 1212, 1220 (E.D. Cal. 2002) (describing relator's theory of falsity based on nursing facility's alleged noncompliance with Medicare conditions of participation).

In addition, many courts have allowed relators to use the so-called "implied false certification theory"—an expansive approach to FCA liability that is premised on the notion that a claimant impliedly certifies its compliance with laws and regulations whenever it submits a claim for payment. *Compare United States ex rel. Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001) (describing genesis of theory and seeking to limit its use in the health care context by recognizing the dichotomy between statutes and regulations creating express conditions of payment, on the one hand, and those creating conditions of participation), *with Hendow*, 461 F.3d at 1177 (suggesting that *Mikes*'s limitation on use of the implied false certification theory should be applied in Medicare cases only).

In this case, the United States Court of Appeals for the Fourth Circuit held that, as a matter of law, reports and audits created by States or their political subdivisions cannot trigger the public disclosure bar. Protesting that it did not have a "secret decoder ring" by which to "gain insight into the meaning of this murky statute" (Pet. App. 32a), the court below conceded that the public disclosure bar does not expressly limit its reach to *federal* administrative reports, *federal* audits or *federal* investigations. The Fourth Circuit then proceeded to misapply the interpretive maxim *noscitur a sociis*—that a word is known by the company it keeps—by disregarding the fact that the "company" the relevant statutory language "keeps" is not singularly federal in character. Rather, the statutory language at issue includes public disclosures made in state and federal fora, as well as in the news media.

SUMMARY OF ARGUMENT

The Fourth Circuit incorrectly held that the public disclosure bar applies only to federal administrative reports, audits or investigations. The plain language of the FCA and a correct application of the doctrine *noscitur a sociis* demonstrate that non-federal reports, audits and investigations also trigger the public disclosure bar. In addition, a survey of this Court's FCA jurisprudence demonstrates that the lower court erred by inserting a "federal" limitation into the public disclosure bar. This Court has consistently refused to infer limitations not found in the plain language of the FCA, and the Court should do so again in this case. This Court has also consistently refused to allow policy-based arguments such as those adopted by the court below to sway its judgment in determining the scope of the FCA, reminding litigants that such arguments are better directed to Congress, not this Court.

If left undisturbed, the lower court's ruling will encourage opportunistic relators to use publicly available information found in the reports of state and local governments as the basis for *qui tam* litigation despite the fact that the FCA would deny subject-matter jurisdiction over *qui tam* actions based on the exact same information if it had been published in a small-town newspaper or in an obscure federal agency report. Liability for hundreds of millions of dollars in mandatory treble damages and civil penalties will turn, not on whether *qui tam* suits are based on publicly disclosed information, but on whether the information was publicly disclosed by a federal, as opposed to a state or local, agency. Such an illogical result is inconsistent with the plain

language of the FCA and should be rejected. In addition, the Fourth Circuit's decision will not only force government contractors and grant recipients to incur substantial litigation costs, it will encourage *qui tam* relators to pursue litigation based on information they had no role in uncovering and, if successful, will reward them handsomely for doing so by paying them a statutory share of hundreds of millions of dollars in mandatory treble damages and civil penalties.

Therefore, as set forth more fully below to supplement the legal argument contained in petitioners' merits brief and to explain the significant negative effects that would flow from a decision affirming the lower court, the judgment of the court of appeals should be reversed.

ARGUMENT

THE PUBLIC DISCLOSURE BAR INCLUDES AUDITS OR INVESTIGATIONS PERFORMED BY STATES OR THEIR POLITICAL SUBDIVISIONS

A. Basic Principles Of Statutory Construction Demonstrate That The Public Disclosure Bar Includes Non-Federal Sources

In a case of statutory construction, a court must always begin with the language of the statute. *Allison Engine*, 128 S. Ct. at 2128. An Act of Congress "should not be read as a series of unrelated and isolated provisions," however. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). Federal courts have a "duty to construe statutes, not isolated provisions." *Id.* at 568.

The court below lost sight of these fundamental principles in holding that the FCA's public disclosure bar does not encompass public disclosures resulting

from state or local government reports, audits or investigations. Conceding that the statute did not expressly limit its reach to *federal* administrative reports, *federal* audits or *federal* investigations, the Fourth Circuit concluded that the word "administrative" was ambiguous. The court of appeals then looked to the doctrine *noscitur a sociis* as a substitute for the "secret decoder ring" the court said Congress failed to provide in order to "gain insight into the meaning of this murky statute." Pet. App. 32a. The Fourth Circuit then misapplied the doctrine by focusing on only one part of the statutory section in question.

This Court has long held that "[s]ound rules of statutory interpretation exist to discover, and not to direct, the Congressional will." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943). Of particular relevance to this case, the "maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). The maxim can be a "useful rule of construction where words are of obscure or doubtful meaning; and then, *but only then*, its aid may be sought to remove the obscurity or doubt by reference to the associated words." *Russell Motor Car Co. v. United States*, 261 U.S. 514, 520 (1923) (emphasis added); *see also Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 840 (2008) (rejecting reliance on *noscitur a sociis* because, "although customs and excise are mentioned twice in [28 U.S.C.] § 2680(c), nothing in the overall statutory context suggests that customs and excise officers were the exclusive focus of the

provision" such that the statutory phrase "any other law enforcement officer" must be similarly limited).

This Court's unanimous decision in *Russell Motor Car* is instructive for how the Court should decide the question presented by this case. There, the Court was asked to decide whether a statute authorizing the President to "modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or materials" for a limited time following the end of World War I applied only to contracts between private parties, as the petitioners argued, or whether government contracts could also be modified by the President. *See id.* at 519. It was "apparent," the Court found, that the words of the statute, "read with literal exactness, include[d] all contracts, whether private or governmental." *Id.* In response, the petitioners argued that since the Federal Government could not "requisition" its own contracts—an assertion accepted by the Court—the doctrine *noscitur a sociis* counseled that the general words "modify, suspend, [or] cancel" should be similarly limited so that only private contracts could be modified, suspended or canceled by the President. *See id.*

In rejecting the petitioners' argument, the Court observed that *noscitur a sociis* is "not an invariable rule, for the word may have a character of its own not to be submerged by its association." *Id.* at 519. "Rules of statutory construction," the Court explained, "are to be invoked as aids to ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place, as this Court has many times held, except in the domain of ambiguity." *Id.*

The Court in *Russell Motor Car* found that application of the doctrine produced an illogical result in the case before it, noting that "there is nothing in the rule or in the statute which requires us to assimilate the words 'modify' and 'cancel' to the scope of the word 'requisition,' simply because the latter has a necessarily narrower application." *Id.* at 520. The Court further explained:

> The meaning of the several words, standing apart, being perfectly plain, what should be done is to apply them distributively, *diverso intuitu* [with a different view, purpose or design], giving each its natural value and appropriate scope when read in connection with the object (any contract) which they are severally meant to control. Thus, the predicate 'requisition' will be limited to private contracts, while the other words may be appropriately extended to include governmental contracts as well.

Id. at 519-20.

As in *Russell Motor Car*, it cannot be seriously disputed that, "read with literal exactness," 261 U.S. at 519, a report, hearing, audit or investigation performed by a State or its political subdivision falls within the plain language of the FCA's public disclosure bar. Again, the public disclosure bar provides that

> [n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, *administrative*, or Government Accounting Office *report*, *hearing*, *audit*, or *investigation*, or from the news media . . .

31 U.S.C. § 3730(e)(4)(A) (emphasis added). Simply because the words "congressional" and "Government Accounting Office" connote federal activity does not mean that the word "administrative" must be so limited or that the word "administrative" is ambiguous. Instead, the "meaning of the several words, standing apart, being perfectly plain, what should be done is to apply them distributively, . . . giving each its natural value and appropriate scope when read in connection with the object . . . which they are severally meant to control." *Russell Motor Car*, 261 U.S. at 520.

The "object" that the public disclosure bar is "meant to control" is litigation brought by opportunistic relators who have no personal knowledge on which to base lawsuits seeking to enforce legal claims belonging to the United States. *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992) ("The 1986 amendments [to the FCA] attempt to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud."). Excluding public disclosures simply because they emanate from non-federal sources conflicts with the core purpose of the statute by encouraging *qui tam* suits based on public information.

To a large extent, the answer to the question presented is dictated by how wide of a lens one uses when applying the doctrine *noscitur a sociis*. The court below focused its attention on the words immediately before and after the word "administrative"—"congressional" and "Government Accounting Office,"

respectively—in order to extract a common characteristic of the company kept by the word "administrative." The Fourth Circuit erred in doing so, however. As one federal court aptly observed:

> [L]imiting the word "administrative" to only federal administrative reports, audits and investigations is inconsistent with the plain language of the phrase at issue as well as the language and interpretation of the remaining portions of § 3730(e)(4)(A). The immediately preceding phrase in that statutory section provides that public disclosures include any "criminal, civil, or administrative hearing," and courts have consistently interpreted that phrase to include both *state* and *federal* litigation and administrative hearings. . . . Likewise, this section of the FCA also gives public disclosure status to "the news media" regardless of whether that media is national, state, or local. There is no reason to conclude that Congress intended to limit administrative reports, audits, and investigations to *federal* actions, while simultaneously allowing all *state* and *local* civil litigation, *state* and *local* administrative hearings, and *state* and *local* news media to be treated as public disclosures. To interpret the statute so narrowly would have the anomalous result of allowing public disclosure status to the most obscure local news report and the most obscure state and local civil lawsuit or administrative hearing, but denying public disclosure status to a formal public report of a state government agency . . . .

In re Natural Gas Royalties Qui Tam Litig., 467 F. Supp. 2d 1117, 1143-44 (D. Wyo. 2006) (citations and

footnote omitted), *aff'd on other grounds*, 562 F.3d 1032 (10th Cir. 2009).

In this case, the "company" the relevant statutory language "keeps" is not singularly federal in character. Rather, the statutory language at issue includes public disclosures made in state and federal fora, as well as in the news media. By interpreting the statute narrowly such that only those disclosures made in federal administrative reports, federal audits or federal investigations trigger the public disclosure bar, the court below gave an impermissibly narrow construction to the statute.

Nor was it necessary to do so in order to "avoid the giving of unintended breadth to [an Act] of Congress." *G. D. Searle*, 367 U.S. at 307. As the court below acknowledged, the words that precede "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation" have been uniformly held to include disclosures made in non-federal settings. *See* Pet. App. 26a ("This court and others have understood [the words 'criminal, civil, or administrative hearing'] to encompass state as well as federal hearings."). The same thing is true of the words that immediately follow "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation." *See* Pet. App. 31a ("[W]e note that in this country there is no 'federal' news media, nor for that matter is there any 'state' news media from which 'federal' news media could be distinguished.").

Therefore, interpreting the words "administrative . . . report, hearing, audit, or investigation" in a non-federal fashion does not expand the statute's meaning past the non-federal boundaries already estab-

lished by Congress in other portions of the public disclosure bar. *Cf.* 132 Cong. Rec. S11,238-04 (daily ed. Aug. 11, 1986) (remarks of Sen. Grassley) ("The use of the term 'Government' in the definition of original source is meant to include any Government source of disclosures cited in subsection [(4)(A)]; that is, Government includes Congress, the General Accounting Office, any executive or independent agency *as well as all other governmental bodies that may have publicly disclosed the allegations.*") (emphasis added).

B. This Court's False Claims Act Jurisprudence Supports The Conclusion That The Word "Federal" Should Not Be Read Into The Public Disclosure Bar

During the FCA's 146-year history, this Court has issued multiple decisions addressing interpretative problems raised by the statute's language. The logic used in several of those decisions counsels that the lower court's decision in this case is incorrect.

1. *United States ex rel. Marcus v. Hess*

In *Marcus*, a relator copied portions of a federal indictment filed against certain electrical contractors and used the indictment as the basis for an FCA complaint filed a few weeks later. *See* 317 U.S. at 545. The United States, acting as an *amicus curiae*, argued that the Court should reject the relator's suit because he had contributed nothing to the fraud's discovery. *See id.* However, the Court declined the Federal Government's invitation because no language in the FCA at that time precluded the relator's conduct. The Federal Government's policy-based arguments, the Court explained, were "addressed to the wrong forum." *Id.* at 547. Although Congress

could have adopted language specifying the amount of new information a relator must possess in order to file suit, Congress had not done so. Therefore, the Court declined to infer such a limitation. *See id.* at 546 & n.9.[3]

The Court in *Marcus* also looked to various clauses within one statutory provision in order to decide whether the conduct in question violated the FCA. The electrical contractors were accused of collusive bid-rigging related to certain contracts entered into with local governments, which contracts were partially funded by the Federal Government. *See* 537 U.S. at 539. In rejecting the electrical contractors' argument that the FCA created liability only if there was a direct contractual relationship with the Federal Government, the Court looked to the various clauses within the FCA's liability provision, which at that time consisted of one long sentence. The Court explained:

> The conclusion that the first clause of [the statute] includes this form of "causing to be presented" a "claim upon or against the Government" is strengthened by consideration of the other clauses of the statute. Clause 2 includes those who do the forbidden acts for the purpose of "aid-

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[3] Congress enacted such a limitation less than one year later. *See* Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608, 609 (prohibiting *qui tam* suits "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought") (codified at 31 U.S.C. § 232(C) (Supp. IV 1945)). The "government knowledge" limitation lasted in amended form until 1986, when Congress adopted the current language of the public disclosure bar.

> ing to obtain" payment of fraudulent claims; Clause 3 covers "any agreement, combination, or conspiracy" to defraud the government by "obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim." These provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.

Id. at 544-45.

As in *Marcus*, the three separate clauses of § 3730(e)(4)(A), considered together, indicate a clear purpose to preclude *qui tam* suits based on public disclosures, without regard to whether the disclosure in question emanated from the Federal Government. Although the second clause of § 3730(e)(4)(A) does not specify whether the word "administrative" should be interpreted to include non-federal sources, the first and third clauses of § 3730(e)(4)(A)—which prohibit *qui tam* suits based on allegations disclosed in a "criminal, civil, or administrative hearing" or from the "news media," respectively—demonstrate that it would be inappropriate to graft a "federal" limitation onto the public disclosure bar as the lower court did in this case.

Furthermore, similar to the situation presented by *Marcus*, the drastic policy choices presented by imposing a federal-only limitation on the public disclosure bar are better left to Congress, not this Court. Section 3730(e)(4)(A) should be applied according to its plain meaning, which imposes no federal limitation on the types of administrative

reports, audits or investigations that trigger the public disclosure bar.

2. *Rockwell International Corp. v. United States*

At least two aspects of this Court's recent decision in *Rockwell* also counsel that the lower court's decision is incorrect. There, the Court was asked to interpret the "original source" exception to the public disclosure bar. The FCA defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B).

Among other things, the Court had to decide what "information" and "allegations" were targeted by § 3730(e)(4)(B). With respect to the word "information," the Court found that when § 3730(e)(4) uses the same word multiple times, that word should be interpreted to have the same meaning. *See* 549 U.S. at 472. The relevant "information" for § 3730(e)(4)(B) purposes, the Court held, was that underlying the relator's allegations, and not that of the public disclosure. *Id.* at 470-71. Importantly, in reaching this conclusion, the Court found that the word "information" in § 3730(e)(4)(B) should be interpreted to have the same meaning as the word "information" in § 3730(e)(4)(A). "'[I]nformation' in (A) and (B)," the Court explained, "means the same thing." *Id.* at 472.

The same logic applied here further demonstrates that the judgment of the lower court should be reversed. As the Fourth Circuit acknowledged, the

word "administrative" in the first clause of § 3729(e)(4)(A) has universally been held to include *non*-federal sources. *See* Pet. App. 26a (collecting cases, including a previous decision of the Fourth Circuit). Therefore, the word "administrative" in the second clause of § 3729(e)(4)(A) should be given the same meaning, such that non-federal administrative reports, audits or investigations trigger the public disclosure bar. *See also* 31 U.S.C. § 3733(*l*)(7)(A) (providing authority for civil investigative demands under the FCA seeking certain types of discovery material from any "administrative proceeding of an adversarial nature," and not limiting the word "administrative" to federal agencies).[4]

The Court in *Rockwell* also refused to infer a limitation on the "original source" exception's plain language. *See* 549 U.S. at 473. After finding that the relevant "information" for § 3730(e)(4)(B) purposes was that underlying the relator's allegations,

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[4] To support its narrow reading of § 3730(e)(4)(A)'s second clause, the United States argues that the statute's first clause should be interpreted narrowly to include only *federal* criminal, *federal* civil, or *federal* administrative hearings. *See* Brief for the United States as *Amicus Curiae* 17-18 (filed May 20, 2009). Essentially, the United States argues that the words "congressional" and "Government Accounting Office" in the second clause of § 3730(e)(4)(A) impose a "federal" limitation on the first clause. *See id.* at 17. However, the plain language of the public disclosure bar supplies no basis on which to infer a "federal" limitation on the first clause's use of the words "criminal, civil, or administrative hearing," a conclusion confirmed by the fact that the first and third clauses of § 3730(e)(4)(A) have been uniformly held to include public disclosures made in non-federal settings. *See* Pet. App. 26a, 31a.

the Court rejected the relator's contention that a court should only examine the relator's original complaint, explaining: "The statute speaks not of the allegations in the 'original complaint' (or even the allegations in the 'complaint'), but of the relator's 'allegations' *simpliciter*. Absent some limitation of § 3730(e)(4)'s requirement to the relator's initial complaint, we will not infer one." 549 U.S. at 473; *see also United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230, 2236 (2009) ("[R]egardless of the purpose of Rule 4(a)(1)(B) [of the Federal Rules of Appellate Procedure] and the convenience that additional time may provide to the Government, this Court cannot ignore the Rule's text . . . .").

In this case, § 3729(e)(4)(A) does not speak of "federal" administrative reports, "federal" hearings, "federal" audits or "federal" investigations. Therefore, like it did in *Rockwell*, the Court should reject the Fourth Circuit's inference of a "federal" limitation on § 3729(e)(4)(A)'s meaning.

3. *Allison Engine Co. v. United States ex rel. Sanders*

Lastly, the Court in *Allison Engine* was asked to interpret the FCA's false-statements and conspiracy provisions. *See* 128 S. Ct. at 2131-32. At the time, the FCA created liability for any person who "knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government," 31 U.S.C. § 3729(a)(2) (2006), or who "conspire[d] to defraud the Government by getting a false or fraudulent claim allowed or paid," § 3729(a)(3).

With respect to their conspiracy count, the relators in *Allison Engine* argued they should not have to

prove that the alleged conspirators had the specific purpose of getting a false claim approved by the Federal Government due to the FCA's broad definition of the word "claim." At the time, the FCA defined the word "claim" to include "any request or demand . . . for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c) (2006). Based on that broad statutory definition, the relators argued it was sufficient for them to prove the alleged conspirators agreed upon a fraudulent scheme that had the effect of causing a private entity to make payments using money obtained from the Federal Government. *See Allison Engine*, 128 S. Ct. at 2130.

The Court eventually rejected the relators' argument, concluding that the interpretation urged by the relators would have required the Court to add language not appearing in the statute. *Id.* at 2131. "Had Congress intended subsection (a)(3) to apply to anyone who conspired to defraud a recipient of Government funds," the Court explained, "it would have so provided." *Id.*[5]

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[5] Congress later removed the words "defraud the Government by getting a false or fraudulent claim allowed or paid" from the FCA's conspiracy provision in order to "specifically address the intent requirement read into the section by the Court in *Allison Engine*." S. Rep. No. 111-10, at 12. In its current form, the FCA creates liability for any person who

The Court in *Allison Engine* also rejected the interpretation of the FCA's false-statements provision forwarded by the relators and supported by the United States acting as an *amicus curiae*. *See* 128 S. Ct. at 2128. Again, the FCA at that time created liability for any person who "knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2) (2006). The relators and the United States argued it was sufficient to demonstrate that a false statement resulted in the use of federal funds to pay a false or fraudulent claim. *See Allison Engine*, 128 S. Ct. at 2128.

That interpretation, the Court found, "impermissibly deviate[d] from the statute's language." *Id.* In particular, § 3729(a)(2)'s use of the words "to get" denoted "purpose, and thus a person must have the purpose of getting a false or fraudulent claim 'paid or approved by the Government' in order to be liable under § 3729(a)(2)." *Id.*[6]

"conspires to commit a violation" of the various new subparagraphs found in the FCA's amended liability provision. FERA § 4(a)(1), 123 Stat. at 1621 (to be codified at 31 U.S.C. § 3729(a)(1)(C) (Supp. IV 2010)).

[6] Congress has since removed the words "to get" from the FCA's false-statements provision in order to "strik[e] the language the Supreme Court found created an intent requirement for false claims liability under that section." S. Rep. No. 111-10, at 12. The FCA now creates liability for any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." FERA § 4(a)(1), 123 Stat. at 1621 (to be codified at 31 U.S.C. § 3729(a)(1)(B) (Supp. IV 2010)).

Likewise, in this case, had Congress intended § 3730(a)(4)(A) to apply only to federal disclosures, it would have so provided. Moreover, Congress's use of the word "administrative" throughout the FCA does not denote the restrictive, federal-only interpretation given to it by the lower court.

C. Allowing Opportunistic Relators To Extract Millions Of Dollars Based On Publicly Available Audits Or Investigations Will Undermine The Purpose Of The Public Disclosure Bar And Have Significant Adverse Effects For Countless Law-Abiding Citizens And Businesses

Even if the Court were to focus on the statutory purpose animating the public disclosure bar, that purpose reinforces the plain statutory meaning set forth above. Compliance with statutes and regulations is critically important and fraud against the Federal Government is unacceptable; however, the proliferation of vexatious or otherwise unmeritorious *qui tam* suits threatens the legitimate business activities of every federal contractor and federal grant recipient in the United States.

The number of *qui tam* suits under the FCA has grown exponentially over the past two decades. *See* U.S. Dep't of Justice, *Fraud Statistics—Overview* (2008) (charting 1048 percent increase in number of new *qui tam* cases filed in federal fiscal years 1987 and 2007, respectively), *as reprinted in* 2 John T. Boese, *Civil False Claims & Qui Tam Actions* (*Civil False Claims*) app. H-2 (3d ed. 2008). The United States pursues less than a quarter of those lawsuits. *See* U.S. Dep't of Justice, *Fraud Statistics—Qui Tam Intervention Decisions & Case Status* (2008), *as*

reprinted in 2 *Civil False Claims* app. H-7. The vast majority are prosecuted after the Department of Justice has declined to intervene by relators who are motivated in large part by the statute's contingent bounty provision and who are not constrained by concerns as to what impact their suits will have. *See, e.g.*, *Conner*, 543 F.3d at 1221 (observing that relator's suit, which alleged that a single false certification on an annual cost report rendered legally false all of a hospital's Medicare and Medicaid reimbursement claims, would have "catastrophic" consequences for those that "provide medical services to the financially disadvantaged and the elderly").

As explained by a recent House of Representatives report:

> More than 97% of the amounts received in settlements and judgments in *qui tam* cases have come in the 20% of the matters in which the Government has intervened. In other words, fewer than 3% of recoveries have been derived from the 80% of the total investigative pool that the Justice Department has rejected. Indeed, last year (through September 30, 2008), the Government recovered about $1.043 billion in *qui tam* FCA cases; of that total roughly $1.037 billion came from *qui tam* cases in which the Justice Department intervened and only about $5.9 million came from relators litigating declined cases.

H.R. Rep. No. 111-97, at 30 (2009) (dissenting views of Reps. Smith, Issa and Jordan).

Vexatious or otherwise unmeritorious *qui tam* suits do more than just increase litigation costs, however. The pressure placed on defendants to settle such suits often proves enormous given the

drastic consequences of an adverse ruling, including the "death penalty" of exclusion from federal programs, which, in turn, can lead to mandatory exclusion from certain state programs. *See, e.g.*, 42 U.S.C. § 1396a(a)(39) (requiring States to exclude from participation in their respective Medicaid programs any individuals or entities excluded by federal authorities). Understandably, many businesses, when faced with a *qui tam* lawsuit that threatens the business' viability, choose to settle.

If allowed to stand, the interpretation of the public disclosure bar adopted by the court below will only exacerbate this situation, as persons with no personal knowledge to support their allegations will be allowed to file suit based on public disclosures contained in reports, hearings, audits and investigations simply because the public disclosures did not emanate from the Federal Government.

In addition, the interpretation of the public disclosure bar adopted by the court below does not properly acknowledge the system of "cooperative federalism" that pervades numerous federal programs. The cooperative federalism model of legislation is that in which the Federal Government encourages States and local governments to implement federal programs. *See, e.g.*, *Schaffer v. Weast*, 546 U.S. 49, 52 (2005) (observing that the Individuals with Disabilities Education Act "is frequently described as a model of cooperative federalism") (citation and internal quotation marks omitted); *New York v. United States*, 505 U.S. 144, 167-68 (1992) (collecting cases demonstrating that "a program of cooperative federalism is replicated in numerous federal statutory schemes[,]" including the Clean

Water Act, the Occupational Safety and Health Act of 1970, the Resources Conservation and Recovery Act of 1976, and the Alaska National Interest Lands Conservation Act) (internal citations and quotation marks omitted); *Batterton v. Francis*, 432 U.S. 416, 431 (1977) (noting that the Aid to Families with Dependent Children program involved the "concept of cooperative federalism").

Medicaid is perhaps the best-known example of cooperative federalism. The Medicaid Act, 42 U.S.C. §§ 1396-1396v, establishes a scheme of joint federal-state funding of health care for millions of low-income individuals, with the States assuming day-to-day responsibility for running their respective Medicaid programs. The Medicaid Act provides that determinations of compliance with program statutes and regulations must be made in onsite inspections known as "surveys." For the most part, those inspections are conducted by state agencies, not the Federal Government. *See, e.g.*, 42 U.S.C. § 1396r(g)(1)(A) (providing that, in the context of Medicaid-participating nursing facilities, "each State shall be responsible for certifying, in accordance with surveys conducted under paragraph (2), the compliance of skilled nursing facilities").

Furthermore, States that wish to receive federal funds must operate a "fraud and abuse control unit," 42 U.S.C. § 1396a(a)(61), and provide a "mechanism to receive reports from beneficiaries and others and compile data concerning alleged instances of waste, fraud, and abuse," § 1396a(a)(64). A State must conduct a preliminary investigation whenever it "receives a complaint of Medicaid fraud or abuse from any source or identifies any questionable prac-

tices." 42 C.F.R. § 455.14 (2008). A State is also required to report to the Federal Government the number of complaints of fraud or abuse that warrant preliminary investigation. § 455.17(a). After conducting a preliminary investigation, if the State has reason to believe that a recipient has abused the Medicaid program, the agency must conduct a full investigation. § 455.15(c). For each case that warrants a full investigation, the agency must report to the Federal Government the provider's name and number; the source of the complaint; the type of provider; the nature of the complaint; the approximate range of monetary losses involved; and the legal and administrative disposition of the case. § 455.17(b).

Yet, the Fourth Circuit's construction of the public disclosure bar would lead to the anomalous result that a formal report prepared by a state Medicaid official and then widely disseminated would not trigger the public disclosure bar, while a one-paragraph article in a little-read weekly newspaper of limited circulation would. Given the close state-federal cooperation manifested by Medicaid and similar programs, non-federal reports, audits and investigations addressing allegations of fraudulent conduct in federal or cooperative programs should trigger the FCA's public disclosure bar.

By strictly limiting the public disclosure bar to information contained in federal reports, federal audits and federal investigations, the Fourth Circuit has opened the courthouse door to *qui tam* actions based on information purloined from audits and reports prepared by non-federal actors. As a result, *qui tam* actions may be initiated in cases where the

relator has no direct or personal knowledge of the information on which the suit's allegations are based. Ironically, while the Fourth Circuit's decision is based on a doctrine (*noscitur a sociis*) designed to divine congressional intent, its interpretation will encourage the very type of opportunistic *qui tam* litigation the public disclosure bar was designed to prevent.

By reading the word "federal" into the public disclosure bar, the Fourth Circuit's decision has also made it more difficult for individuals who actually possess personal knowledge of fraudulent activity to bring *qui tam* suits. Under the FCA's first-to-file bar, the filing of a *qui tam* suit by one relator prevents the filing of a subsequent *qui tam* suit by another relator. 31 U.S.C. § 3730(b)(5). Under the lower court's construction of the public disclosure bar, therefore, an individual who closely observed fraudulent conduct could have their *qui tam* action blocked by an individual whose earlier-filed *qui tam* action was based on publicly disclosed information found in a non-federal report, audit or investigation.

D. The Public Disclosure Bar Should Be Construed In Favor Of Restricting Subject-Matter Jurisdiction Since The Bar Acts As A Limitation On The Extraordinary Assignment Of Legal Claims Belonging To The Federal Government

The FCA's *qui tam* provisions provide a limited exception to the common-law rule that private citizens have no standing to prosecute legal claims belonging to the United States. *See Stevens*, 529 U.S. at 776 (explaining in detail the history of *qui tam* actions in England and concluding that no

common-law right to pursue such actions existed in the American Colonies); *see also Woods v. Empire Health Choice, Inc.*, 574 F.3d 92, 98 (2d Cir. 2009) ("There is . . . no common law right to bring a *qui tam* action; rather, a particular statute must authorize a private party to do so."); *Stalley v. Methodist Healthcare, Inc.*, 517 F.3d 911, 917 (6th Cir. 2008) ("There presently is no common-law right to bring a *qui tam* action, which is strictly a creature of statute."), *cert. denied*, 129 S. Ct. 1004 (2009); *Stalley v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1233 (11th Cir. 2008) (same); *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007) (same); *United Seniors Ass'n v. Philip Morris USA*, 500 F.3d 19, 23-24 (1st Cir. 2007) (same), *cert. denied*, 128 S. Ct. 1125 (2008).

As this Court held in *Stevens*, 529 U.S. at 773, the FCA's *qui tam* provisions provide an extraordinary exception to the common-law rule by partially assigning legal claims belonging to the Federal Government, which, in turn, gives the relator Article III standing. The FCA is one of the very few federal statutes providing such an assignment. *See Stevens*, 529 U.S. at 768 n.1. The FCA's public disclosure bar, in turn, functions as a congressionally imposed limitation on the assignment of the Federal Government's legal claims. In light of the foregoing, the public disclosure bar should be applied according to its plain meaning and not according to the "secret decoder ring" provided by *noscitur a sociis*.

The court below recognized the "logic and symmetry" of contrary decisions, observing: "Although we ultimately disagree with this approach to the statute, we must admit that there is some force to the

argument." Pet. App. 28a. The tenor of the lower court's decision suggests that the court struggled to discern what Congress intended through the cautionary tale in legislative draftsmanship that is the public disclosure bar.

Should this Court find itself in a similar situation after examining the arguments for and against the lower court's judgment, the default presumption that private persons have no standing to prosecute legal claims belonging to the United States counsels that the public disclosure bar should be construed in favor of limiting the ability of private persons to exploit the partial assignment provided by the FCA's *qui tam* provisions. *Cf. United States v. Bornstein*, 423 U.S. 303, 313 n.8 (1976) (noting that ambiguities in the FCA should be interpreted in favor of the defendant given the statute's penal nature).

CONCLUSION

For the foregoing reasons and those stated in the brief of petitioners, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2009

AMICUS CURIAE BRIEF

140

(13)

No. 08-804

IN THE

Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, *et al.*,
Petitioners,

v.

UNITED STATES EX REL. KAREN T. WILSON
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, GOVERNMENT FINANCE OFFICERS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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BOTH SIDES

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QUESTION PRESENTED

Whether an audit and investigation performed by a State or its political subdivision constitutes an "administrative * * * report, * * * audit, or investigation" within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members are municipal governments and officials throughout the United States.[1] These organizations regularly file *amicus* briefs in cases that, like this one, raise issues of vital concern to the Nation's local governments.

In *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119 (2003), this Court held that private plaintiffs may sue local governments under the False Claims Act. This case presents the question whether a private plaintiff's suit under the Act is barred when it consists of allegations based on information that has already been publicly disclosed in an audit report of a state or local government. The resolution of that question will determine the circumstances in which local governments may be liable under the Act. Resolution of the question will also affect the consequences for local governments of conducting certain audits and investigations and, more generally, the conditions under which those governments administer federally funded programs. For these reasons, *amici* have a compelling interest in the question presented and a unique perspective on its proper resolution.

A brief description of each *amicus* organization appears in the appendix to this brief.

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[1] *Amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

SUMMARY OF ARGUMENT

Petitioners' brief demonstrates why the decision below is inconsistent with the text and purpose of the False Claims Act. In this brief, *amici* explain how the court of appeals' interpretation of the jurisdictional bar harms local governments and respond to one of the Solicitor General's arguments in defense of that interpretation.

1. If adopted by this Court, respondent's construction of the jurisdictional bar would harm local governments in two ways. First, by allowing plaintiffs to piggy-back on the investigative efforts of local agencies, it would hinder local governments' ability to investigate wrongdoing in connection with federally funded programs. It would create disincentives for agencies to conduct audits and investigations, and create incentives for plaintiffs' lawyers to interfere with those audits and investigations once begun. Second, local governments would be compelled to divert increasingly scarce resources to pay for *qui tam* litigation initiated by opportunistic plaintiffs.

2. The Solicitor General argues that the term "administrative" must have an exclusively federal meaning because the jurisdictional bar does not cover state *legislative* reports and it would therefore be anomalous for the bar to cover state *administrative* reports. There is no such anomaly. At the time of the jurisdictional bar's enactment, Congress provided state legislatures essentially no role in the administration of federally funded programs and assigned almost all responsibility to governors and state administrative agencies. It is therefore likely that Congress did not envision a role for state legislatures in the investigation or audit of the use of federal funds. For that reason, the omission of state legisla-

tive reports from the statute is consistent with a congressional intent to include state and local administrative reports.

ARGUMENT

I. IF ADOPTED BY THIS COURT, RESPONDENT'S CONSTRUCTION OF THE JURISDICTIONAL BAR WOULD HARM LOCAL GOVERNMENTS.

For most of the long history of the False Claims Act, *qui tam* actions were not brought against local governments. In 2003, however, this Court held that local governments are subject to *qui tam* suits. *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119 (2003). That decision has exposed more than 87,000 local governments to suits under the Act. See U.S. Census Bureau, Federal, State and Local Governments, 2002 Census of Governments, *Preliminary Report No. 1*, July 2002, at 1, available at http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf. At the same time, there has been a marked increase in the overall number of False Claims Act filings by private plaintiffs. See U.S. Department of Justice, Civil Division, *Fraud Statistics Overview* 2, available at http://www.taf.org/STATS-FY-2007.pdf.

Many of the *qui tam* suits since *Cook County* have been filed against local governments, which participate in a variety of federal programs and receive substantial federal funding. See *Cook County*, 538 U.S. at 129. In 2001-2002, the most recent period for which statistics are available, federal transfer payments accounted for $15.2 billion of municipal governments' revenues. See U.S. Census Bureau, 2002 Census of Governments, *Finances of Municipal and Township Governments: 2002*, Apr. 2005, at 1, available at http://www.census.gov/prod/2005pubs/

gc024x4.pdf. Federal payments have increased greatly in the years since, given the dramatic rise in the number of federally funded programs after the terrorist attacks of September 11, 2001 and during the severe recession that began in 2008. See, *e.g.*, Steven Maguire & Shawn Reese, *CRS Report for Congress, Department of Homeland Security Grants to State and Local Governments: FY2003 to FY2006,* at 2-9, Dec. 22, 2006, available at http:// www.fas.org/sgp/crs /homesec/RL33770.pdf (discussing grant programs instituted after September 11, 2001, including Law Enforcement Terrorism Prevention Program and Metropolitan Response Program); National Conference of State Legislatures, *Economic Recovery Overview*, last updated Aug. 13, 2009, available at http://www.ncsl.org/?TabId=16779 (describing distribution of funds under American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, by category, including education and law enforcement). State and local agencies participating in federally funded programs regularly conduct audits or investigations in connection with the programs—as a condition of their participation, see, *e.g.*, 31 U.S.C. § 7502; at the request of the relevant federal agency; or as a matter of good governance.

As *amici* explain below, respondent's construction of the False Claims Act, if adopted by this Court, would harm local governments in two ways. First, it would enable relators to sue local governments based on information obtained during state and local audits and investigations, thereby hindering their ability to monitor the use of federal funds. Second, it would require local governments to divert scarce resources to defend, settle, and pay judgments in *qui tam* suits filed by opportunistic plaintiffs.

A. Respondent's Construction of the Jurisdictional Bar Would Hinder the Ability of Local Governments to Investigate the Misuse of Federal Funds.

The court of appeals construed the False Claims Act to permit relators to use state and local audits offensively against municipalities. Local governments may understandably seek to avoid such litigation by deciding not to conduct an audit or investigation that is not required by law or, if they do conduct one, by deciding not to make the results public. In either event, their taxpayers will suffer.

The type of publicly disclosed self-policing at stake serves a number of purposes. It monitors the use of federal funds; it informs local taxpayers how elected officials are performing their duties; and it deters misuse of the funds. If such publicly disclosed self-policing can expose local governments to *qui tam* actions by opportunistic relators, there will very likely be a reduction in either self-policing or public disclosure. The court of appeals and respondent have in effect endorsed the principle that no good deed should go unpunished; under their interpretation of the jurisdictional bar the "reward" for publicly disclosed self-policing is a lawsuit.

Because a foreseeable consequence of the court of appeals' decision is that local governments will, when possible, either decline to investigate themselves or decline to disclose their findings, the judgment below is both unfair and unwise. Local governments should not be put to the Hobson's choice of subjecting themselves to litigation or avoiding self-investigation. And Congress could not have intended that they would be.

Affirmance of the court of appeals' decision would hinder government investigations in another way. As petitioners explain (Pet. Br. 29-31), plaintiffs without any independent knowledge of the possible misuse of federal funds would scour state and local government reports, audits, and investigations that are already available, or obtain those that are not readily available through freedom-of-information requests,[2] and then file *qui tam* suits based on information copied from the state or local source.

Moreover, given the False Claims Act's first-to-file provision, under which the filing of a *qui tam* action by one plaintiff cuts off later-filed actions by other plaintiffs, 31 U.S.C. § 3730(b)(5), plaintiffs' lawyers would have an incentive to request information and file suit before investigations have been completed. Such frequent and often premature demands for public records, whether in the form of informational requests or as part of the civil discovery process, would inhibit state and local agencies' ability to conduct thorough and accurate investigations.

To uncover misconduct, state and local agencies typically pursue multiple leads, interview numerous witnesses, and explore many potential dead ends. Repeated requests for records before investigations are complete are therefore not likely to uncover wrongdoing, but they are highly likely to interfere with investigations. State and local agencies should

[2] All 50 States have a FOIA statute or its equivalent. See Matthew D. Bunker et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 543 (1993). Many state statutes permit broad access to these types of records. See, *e.g.*, Cal. Gov't Code § 6250 et seq.; N.C. Gen. Stat. § 132-1; Ohio Rev. Code § 149.43; Tex. Gov't Code Ann. § 552.001 et seq.; Va. Code Ann. § 2.2-3704 et seq.

not be hindered in their efforts to conduct audits and investigations, and Congress could not have intended that they would be.

B. Respondent's Construction of the Jurisdictional Bar Would Require Local Governments to Divert Scarce Resources to Litigate Opportunistic *Qui Tam* Suits.

The court of appeals' decision substantially expands the universe of potential *qui tam* suits against local governments The costs of defending these suits, and of paying settlements and judgments, including treble damages and attorneys' fees, see 31 U.S.C. §§ 3729(a)(1), 3730(g), will distort the budgets of those municipalities, many of which are already experiencing severe fiscal difficulties.

Most local governments' budgets contain very high fixed costs for law enforcement, emergency services, and other first responders. See U.S. Department of Labor, Bureau of Labor Statistics, *Career Guide to Industries, 2008-09 Edition, State and Local Government Except Education and Hospitals*, Mar. 12, 2008, available at http://www.bls.gov/oco/cg/cgs042.htm. In 2001-2002, for example, public safety accounted for over 15 percent of municipal expenditures. See 2002 Census of Governments, *supra*, at 1.

Over the past two years, municipalities' budgets have become increasingly stretched as revenues have steadily decreased but fixed costs have not. As a result of deteriorating economic conditions, two-thirds of city financial officers reported that their cities were less able to meet fiscal needs in 2008 than in the previous year. See National League of Cities,

City Fiscal Conditions in 2008, Sept. 2008, at 5, available at http://66.218.181.91/ASSETS/A49C8612 2F0D4DBD812B91DD5777F04D/CityFiscal_Brief_08 -FINAL.pdf. And "all indications point to worsening city fiscal conditions in 2009 and 2010." *Ibid.*

It is thus singularly inequitable to require local governments to divert scarce resources to litigate *qui tam* actions like this case. As noted above, one such glaring injustice is that plaintiffs' lawyers without independent knowledge of a false claim can simply monitor state or local government reports, audits, and investigations or obtain them through freedom-of-information requests. Consequently, under respondent's theory local governments not only would be required to spend taxpayer dollars on *qui tam* litigation, they would face the prospect of paying windfalls to "opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

II. THE OMISSION OF STATE LEGISLATIVE REPORTS FROM THE JURISDICTIONAL BAR DOES NOT SUPPORT RESPONDENT'S CONSTRUCTION.

In defending the decision below, the Solicitor General has advanced a theory on which the court of appeals itself did not rely: that reading the term "administrative" to include state and local administrative agencies "would create an unwarranted anomaly," by "put[ting] a State's legislature on a lesser footing than a local county administrator." U.S. Br. *Am. Cur.* 8-9. Because "state legislative reports are excluded from the scope of [the jurisdictional bar]," the Solicitor General argues, "Congress did not likely

intend to mandate different treatment for reports by a state or local 'administrative' body." *Id.* at 9.

This contention is mistaken. As we explain below, the omission of state *legislative* reports from the False Claims Act's jurisdictional bar is consistent with a congressional intent to include state and local *administrative* reports.

As of 1986, when the current version of the jurisdictional bar was enacted, Congress had provided essentially no role for state legislatures in the administration or oversight of federally funded programs. As one authority has put it, in the years leading up to the 1986 amendments, "most grant-in-aid statutes [did] not specify any role for state legislatures." George D. Brown, *Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs*, 28 AM. U. L. REV. 279, 282 (1979). Instead, federal grant programs assigned virtually all administrative responsibility to state executive agencies. See, *e.g.*, U.S. General Accounting Office, *Federal Assistance System Should be Changed to Permit Greater Involvement by State Legislatures* 11 (Dec. 15, 1980) (detailing "widespread assignment of legislative functions to Governors or State agencies in federal grant programs"); see also Michael J. Curro, *The Federal Interest in Legislative-Administrative Relations in the States* 3 (report prepared by senior GAO evaluator for Midwest Political Science Association's 1981 annual meeting); Carol S. Weissert, *State Legislatures and Federal Funds: An Issue of the 1980s*, 11 PUBLIUS: THE JOURNAL OF FEDERALISM 67 (Summer 1981); Brown, *Federal Funds and National Supremacy*, 28 AM. U. L. REV. at 282, 286-287.

In 1980, the GAO reviewed 75 federal grant programs, which represented the largest such programs

available to state governments and accounted for over $43 billion in FY 1979. Seventy of the programs assigned to the governor or a state administrative agency the function of preparing and submitting applications for federal assistance. *Federal Assistance System Should Be Changed* at 13. Of the 36 federal programs that assigned to the State the tasks of overseeing and evaluating the program, moreover, *every one* assigned those tasks to a state administrative agency. *Id.* at 16. As far as the administration of federal programs was concerned, state legislatures were, as one GAO official put it, the "odd man out." Curro, *supra*, at 1.

Contemporaneous federal statutes demonstrate that Congress viewed governors and administrative agencies, not legislatures, as the state officials and entities that would disburse federal funds, set the priorities for those funds, administer the federal programs, and evaluate their performance. See *Federal Assistance System Should Be Changed* at 11-14. For example, legislation establishing the Urban Mass Transit program designated the governor as the recipient of the federal funds and the official who "shall determine" the amounts available to each municipality. *Id.* at 13-14. Legislation establishing State Energy Conservation programs authorized "the Governor" to "submit * * * a State energy conservation plan." Energy Policy and Conservation Act, Pub. L. No. 94-163, § 362(c), 89 Stat. 871 (1975). And the Comprehensive Employment and Training Act of 1973, (CETA), Pub. L. No. 93-203, 87 Stat. 839, specified that the governor would receive and disburse the federal funds. *Federal Assistance System Should Be Changed* at 26. Indeed, the Labor Department's Solicitor opined that state legislative appropriation of CETA funds would violate grant conditions, be-

cause it would "hinder[] [the governor's] exercise of the administrative discretion assigned to him by the Federal statute." *Ibid.*

These are just a few of the statutes that assigned roles to the state executive branch—but not to the state legislative branch—in administering federal programs. There were many others. See, *e.g.*, 16 U.S.C. § 1455(c)(5) (1976) (requiring governors in States with substantial water-quality problems to allocate federal funding to a state agency for administration); 16 U.S.C. § 1455(h) (1976) (specifying that governor has authority to target specific areas for activities such as health planning and water-quality planning); 29 U.S.C. § 721(a)(1)(A) (1976) (providing that funds for vocational rehabilitation are to be administered by state agency).

The legislative histories of other statutes confirm that Congress deemed the state executive branch more suitably structured than the legislative branch to administer federal grant programs. For example, the legislative history of the statute that established the Law Enforcement Assistance Administration (LEAA), Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197, states that the governor was designated to administer the program because Congress believed that it would be "more convenient and effective" to deal with a single authority representing the State "than [with] a body as diverse and pluralistic as a legislature." *Federal Assistance System Should be Changed* at 12. As Senator Dirksen put it, "[we need] a captain at the top, in the form of the Governor, and those he appoints, to coordinate the matter for a state." *Ibid.* Similarly, the Senate Judiciary Committee explained as follows why the planning agency for the LEAA should be administered by the state executive

branch: "It would be inconsistent with the centralized and coordinated statewide planning that is one of the key elements of the LEAA program and render close supervision more difficult. Such a structuring of the program would also create a greater danger of politicization of the LEAA effort." S. REP. NO. 847, 94TH CONG., 2D SESS. 16 (1976).

When state legislatures *were* given a role in federal programs, it was generally quite restricted. For example, federal grant programs did not "recognize legislative changes to State executive plans unless approved by the Governor or the designated state agency." *Federal Assistance System Should be Changed* at 23. Moreover, while some federal programs required the State to match a specific percentage of the grant funds, such requirements did not allow state legislatures to substitute alternatives for the executive proposals; the legislatures were thus faced with the choice of accepting proposals they may have found problematic or losing the federal grant money altogether. *Id.* at 23-24. Finally, many federal programs allowed state agencies to use in-kind matching resources to satisfy the match requirement, thereby enabling the state executive to bypass the legislature entirely. *Ibid.*

When, in 1980, the GAO asked Congress to provide a greater role for state legislatures in federally funded programs, Congress declined to do so. The GAO specifically proposed that Congress amend the Intergovernmental Cooperation Act of 1968, Pub. L. No. 90-577, 82 Stat. 1098, to ensure that, "on a cross-cutting basis applicable to all Federal grant programs, grant provisions assigning responsibilities to State executive officials not be construed as limiting or negating the powers of State legislatures under State law to appropriate Federal funds, to designate

State agencies, and to review State plans and grant applications." *Federal Assistance System Should Be Changed* at iii. Congress made no such amendment. See 42 U.S.C. § 4201 (1968) (making no amendments regarding state legislative involvement in administration or oversight of federal funds between 1980 and 1981), *recodified* at 31 U.S.C. §§ 6501-6508 (making no amendments regarding state legislative involvement in administration or oversight of federal funds between 1981 and False Claims Act's amendment in 1986).

In short, as of 1986, when it added the jurisdictional bar to the False Claims Act, Congress had provided essentially no function for state legislatures in the implementation, administration, or evaluation of federally funded programs. It is therefore likely that Congress did not envision a role for state legislatures in the investigation or audit of the use of federal funds. Not surprisingly, Congress did not include state legislative reports in the jurisdictional bar, and no "anomaly," U.S. Br. *Am. Cur.* 8, results from that omission.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

AMICUS ORGANIZATIONS

The Government Finance Officers Association seeks to enhance and promote the professional management of governments for the public benefit by identifying and developing financial policies and practices and promoting them through education, training, and leadership.

The International City/County Management Association is a non-profit professional and educational organization for chief appointed managers, administrators, and assistants in cities, towns, counties, and regional entities. Its mission is to create excellence in local governance by advocating and developing the professional management of local governments worldwide.

The International Municipal Lawyers Association is a non-profit organization that has served as an advocate and resource for local government attorneys since 1935. With more than 2,500 members, IMLA operates as an international clearinghouse for information and cooperation on municipal legal matters.

The National Association of Counties is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's counties. It advances county-related issues with a unified voice before the federal government and assists counties in finding and sharing solutions.

The National League of Cities was established in 1924 by and for reform-minded state municipal leagues. Today it represents more than 19,000 cities, villages, and towns across the country. NLC's mis-

sion is to strengthen and promote cities as centers of opportunity, leadership, and governance; to provide programs and services that enable local leaders to better serve their communities; and to function as a national resource and advocate for the municipal governments it represents.

The U.S. Conference of Mayors is the official nonpartisan organization of cities with populations of 30,000 or more. Among UCSM's primary roles are promoting the development of effective national urban/suburban policy, strengthening federal-city relationships, and ensuring that federal policy meets urban needs.

AMICUS CURIAE BRIEF

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(16)

Supreme Court, U.S.
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No. 08-304

In the Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATES OF PENNSYLVANIA, ALABAMA, ALASKA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, UTAH, VERMONT, VIRGINIA, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI

The *amici* are States which both receive federal grants and administer programs involving hundreds of billions of dollars of federal funds. Federal law requires them to submit audits and reports of the programs they administer to the federal government, and these audits and reports are also available to the public, in many cases at a clearinghouse maintained by the federal government. The *amici* have an interest in having these materials declared "public disclosures" under the False Claims Act, and thereby avoiding parasitical claims based upon them, because they may themselves be *qui tam* relators if they uncover improper or fraudulent claims. The Court of Appeals' decision places that status in jeopardy, because persons who do no more than gain access to the States' work will be able on that basis to file *qui tam* actions themselves, and if they are first to file, pre-empt a state claim. The decision also denigrates the role of state and local governments in administering federal programs by denying public source status to their reports and audits while according it to a newspaper article, a result Congress surely never intended.

SUMMARY OF ARGUMENT

The Court of Appeals held that the language of the False Claims Act bars *qui tam* actions that are based on public sources like newspapers and federal audits and reports but not on state and local audits and reports that are available to the public. The Court of Appeals rewrote the plain language of the statute and produced a nonsensical result that Congress cannot have intended – especially with respect to the Single

Audit Act, a federal law that requires state and local governments which administer federal programs to submit audits and reports on those programs to the federal government. One of the purposes of the False Claims Act is to encourage *qui tam* actions by true whistleblowers who have access to information that the federal government does not. It makes no sense, however, to allow *qui tam* actions by *qui tam* relators who have done no more than to read state or local audits and reports which, pursuant to the Single Audit Act, are made for the benefit of the federal government, and which are maintained for it and for public view at an online clearinghouse maintained by the United States Census Bureau.

ARGUMENT

State and Local Audits and Reports That Are Available to the Public Are "Public Sources" Under the False Claims Act.

The question in this case is whether audits and reports generated by States and local governments, as opposed to the federal government, are "public sources" of information under the False Claims Act such that private "*qui tam*" actions based on them are barred. *See* 31 U.S.C. § 3730(e)(4)(A). The Court of Appeals held that the Act's reference to public disclosure of information applied only to audits conducted by federal agencies. We agree with the petitioner that this is simply incorrect as a matter of statutory construction, as the language of the statute is broad and clear. Beyond this, however, from the perspective of the States this construction makes no

sense at all, because in many cases state audits of federal programs they administer are required by the federal Single Audit Act. 31 U.S.C. §§ 7501-7507. are done for the benefit of federal authorities, and are available to the public, among other places, at a clearinghouse maintained by the federal government.

1. The False Claims Act, 31 U.S.C. §§ 3729-3733, which provides for treble damages, civil penalties and attorneys fees against those who submit false claims to obtain federal money, has been termed "the federal government's primary anti-fraud tool for recovering ill-gotten gains from companies submitting false claims for payments to more than twenty government agencies or programs, such as Medicare and the military." "Understanding the 'Original Source Exception to the False Claim Act's Public Disclosure Bar' in light of the Supreme Court's Ruling in *Rockwell v. United States*," 7 DePaul Bus. and Com. L.J. 1 (2008). The Act achieves its purpose partly by encouraging the aid of "whistleblowers" – private parties who may bring *qui tam* actions on behalf of the government and share in any recovery. 31 U.S.C. §§ 3730, 3730(d). Since the 1986 amendments to the False Claims Act, *qui tam* relators have received over $2 billion in total awards – almost $198 million in 2008 alone. *See* Fraud Statistics Overview, Civil Division, U.S. Department of Justice, http://www.usdoj.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm. The idea behind this kind of claim is that the government can effectively "purchase" nonpublic information from relators in exchange for a share in the government's potential recovery. "The False Claims Act Clarification Act: An End to the FCA's Bar on Parasite Qui Tam Actions," Vol. 44, Procurement Lawyer, 7 (Spring 2009), citing

United States ex rel. Russell v. Epic Healthcare Mgmt. Group, 193 F.3d 304, 309 (5th Cir. 1999). On the other hand, parties who themselves bring no new information to light should not be able to make the government "purchase" information which it already has, or can get for free. Thus, the same language of the False Claims Act precludes parasitic *qui tam* claims predicated on public information to which the government already has access:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). The Department of Justice has gone on record that, in its view, "a relator who has no first-hand information about fraud and brings nothing new to the suit should not be entitled to reap the rewards of a False Claims Act suit." The False Claims Corrections Act (2041): Strengthening Fraud for the 21st Century: Hearing Before the S. Comm. on the Judiciary, 110th Cong. (2008) (statement of Michael Hertz, Deputy Assistant Atty. Gen. of the United States), *quoted in* "The False Claims Clarification Act," at 3, *supra*.

Despite the clarity and breadth of this language, the Fourth Circuit has said that it applies only to federal audits and hearings. The Court of Appeals

conceded that "the statute by its express terms does not limit its reach to federal administrative reports or investigations," Pet. App. at 22a, but concluded that, because the law includes some specific references to congressional and GAO reports, the entire listing should be taken to include "only those reports that originate with the federal government." *Id.* at 23a. In drawing this conclusion – that Congress intended to limit public sources to federally originated report and audits – the court used the interpretive maxim "*noscitur a sociis*" – "a word is known by the company it keeps," *id.* at 23a, and also the principle that, "where possible, courts should give effect to every word in a statute." *Id.* at 31a. The court observed that "[i]f Congress had intended clause two to encompass state audits, reports, or investigations, it could have saved a few words by referring to disclosures in *governmental* audits, reports, or investigations, a phrasing that avoids the use of words that are inherently and exclusively federal in nature." *Id.*

2. We agree with petitioner that the Court of Appeals has essentially rewritten the plain and clear language of a statute in a way that will in many cases lead to nonsensical results, and cannot be what Congress intended.

The general rule is that if statutory text is plain and unambiguous, the Court "must apply the statute according to its terms." *Carcieri v. Salazar*, ___ U.S. ___, 129 S.Ct. 1058, 1063-64 (2009), citing *United States v. Gonzales*, 520 U.S. 1, 4 (1997); *Dodd v. United States*, 545 U.S. 353 (2005); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530

U.S. 1, 6 (2000); *Caminetti v. United States*, 242 U.S. 470 (1917). Here the statute is indeed plain and unambiguous.

By its terms, the False Claims Act bars *qui tam* actions that are based on an "administrative . . . report . . ., audit or investigation." 31 U.S.C. § 3730(e)(4). In the elided text, Congress did include the terms "congressional" and "Government Accounting Office," presumably to illustrate the type of report, hearing, audit or investigation classified as a public source, but the Court of Appeals was wrong to seize on this and the doctrine of *noscitur a sociis* to limit the broad language of the False Claims Act. The Court has said that pairing a broad statutory term with a narrow one does not shrink the broad one. *S.D. Warren, Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), yet that is what the Court of Appeals has done here. Neither was the Court of Appeals justified in adding words to the statute, effectively rewriting it to refer to *federal* reports, *federal* audits, and *federal* investigations.

Rewriting a statute like this by a court is never appropriate. The Court has said that it is "not free to rewrite [a] statute that Congress has enacted. When the statute's language is plain, the sole function of the courts – at least when the disposition required by the text is not absurd – is to enforce it according to its terms," *Dodd v. U.S.*, 545 U.S. 353, 358 (2005) (internal quotations marks and citations omitted). In this case it is the text as rewritten by the Court of Appeals that makes no sense, leading to irrational distinctions and anomalous results.

In this regard, the Court has said with respect to statutory construction that, its "role [is] to make sense rather than nonsense out of the *corpus juris*." *West Virginia University Hospitals v. Casey*, 499 U.S. 83, 101 (1991). But in at least one important respect, the Court of Appeals' reading of the statute does just the opposite. The Single Audit Act, 31 U.S.C. § 7501, *et seq.*, imposes broad and comprehensive auditing and reporting requirement on all State, local government or non-profit organizations, 31 U.S.C. § 7501(a)(13), which expend, either directly or through subrecipients, more than $500,000 in federal funds a year.[1] 31 U.S.C. § 7501(a)(4); 31 U.S.C. § 7501(a)(14). Thus, the Single Audit Act applies to all significant federal programs administered by state and local governments.[2] *See generally*, United States Office of Management and Budget, http://www.whitehouse.gov/omb/financial_fin_single_audit/.

The audits prescribed by the Act are "in lieu of any financial audit of Federal Awards which a non-Federal entity is required to undergo under any other Federal law or regulation," 31 U.S.C. § 7503(a), and, depending on the circumstances, may be state-wide, agency specific, or program specific. 31 U.S.C. §§ 7502(a)(1)(B) and (c); 7502(d). The audit is to be

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[1] The Single Audit Act was first enacted in 1984, two years before the amendment to the False Claims Act here in issue, and its monetary threshold has increased over time, from its original threshold of $25,000.

[2] Although state and local governments which receive less than $500,000 a year in federal funds are exempt from the Single Audit requirement, they are not exempt from any federal record keeping requirement. 31 U.S.C. § 7502(B).

conducted by an independent auditor "in accordance with generally accepted government auditing standards." 31 U.S.C. § 7502(c). The auditor is required to report any noncompliance with applicable laws and regulations. 31 U.S.C. § 7502(e)(4), (g)(2). When the audit is completed, the State or local government is to transmit the "reporting package," which includes "financial statements, schedule of expenditure of Federal awards, corrective action plan . . . and auditor's reports . . . to a Federal clearinghouse designated by the Director [of the Office of Management and Budget] available for public inspection . . .". 31 U.S.C. § 7502(h). The federal audit clearinghouse is maintained by the United States Census Bureau. *See* Federal Audit Clearinghouse, http://harvester.census.gov/sac/ and the Census Bureau says that "the Federal Audit Clearinghouse (FAC) facilitates Federal oversight of entities expending federal money. The FAC accomplishes this goal by being the sole source of Single Audit information for federal agencies for a majority of auditees. In addition, public scrutiny of Federal grants is increased by making audit information public." *See* http://www.census.gov/econ/overview/go1400.html.

Besides requiring that the audit reporting packages be maintained in a clearinghouse easily accessible to the public, the Single Audit Act gives federal agencies other responsibilities with respect to the audits generated pursuant to it. The Act contemplates, for example, that the appropriate federal agencies will review the audit materials: "To the extent that such audit provides a Federal agency with the information it requires to carry out its responsibilities . . . a Federal agency shall rely upon

and use that information." 31 U.S.C. § 7503(b). Federal agencies that disburse federal funds are not only to monitor the use of those funds, 31 U.S.C. § 7504(a)(1), but also to "assess the quality" of audits conducted under the Single Audit Act, 31 U.S.C. § 7504(a)(2), and provide "technical assistance" with respect to them when necessary. 31 U.S.C. § 7504(b).

As applied to the reporting packages generated by state and local governments pursuant to the Single Audit Act, the ruling of the Court of Appeals makes no sense at all, because, pursuant to the ruling they do not qualify as public sources of information under the False Claims Act since they were not generated by a federal agency. As we have said before, the statutory language of the False Claims Act certainly by its plain terms seems broad enough to encompass Single Audit reporting packages, and considering these materials "private" information cannot be a result Congress intended. These reports and audits are required by federal law, are prepared for the benefit of federal agencies which have a statutory duty to review them, and are maintained for public view in a clearinghouse maintained by the United States Census Bureau. If the purpose of the "public source" provisions is "to encourage legitimate private suits by legitimate whistleblowers, while barring suits by opportunistic *qui tam* plaintiffs who base their claims on matters that have been publicly disclosed by others," *Hays v. Hoffman*, 325 F.3d 982, 987 (8th Cir.), cert. denied, 540 U.S. 877 (2003); S.Rep. No. 99-346, 99th Cong. 2nd Sess., reprinted in 1986 U.S.C.C.A.N. 5266, then this interpretation of the statutory language is nothing short of nonsensical as it applies

to the reports and audits covered by the Single Audit Act.

3. The Court of Appeals' holding, applied to the Single Audit Act, is not without cost to the federal government and to the States as well. In the first place, the federal government may wind up paying a *qui tam* share for information it already has, which was developed for it, and which its agencies are statutorily required to monitor. If single audit reports are not public sources, then a relator can file a claim under the False Claims Act based solely on information contained in them, and share in any recovery *even if* the government chooses to intervene. 31 U.S.C. § 3730(d).[4]

This result hurts the States too, which are themselves potential *qui tam* relators. 1 John T. Boese, Civil False Claims and Qui Tam Actions § 4.01(B)(5), at 4-19 (3d ed. 2005) ("A number of *qui tam* cases have been brought by state and local governments."); *see, e.g., United States ex rel. Hartigan v. Palumbo Bros., Inc.*, 797 F.Supp. 624 (N.D. Ill. 1992) (*qui tam* action brought by Illinois Attorney General); *United States ex rel. Magnolia City Hospital v. Medical Business Assocs.*, 2006 U.S. Dist.

[4] The same is true with respect to the many other reports that states and local governments must file with the United States. *See, e.g.*, 42 U.S.C. § 300g-9(b)(2), (c)(3); 42 U.S.C. § 1396b(d)(1), (6); 42 U.S.C. § 1758(h)(3); 42 U.S.C. § 3796dd-6; 42 U.S.C. § 3796kk-6; 49 U.S.C. § 47141(d).

LEXIS 46713 (W.D. Ark. 2006) (*qui tam* action brought by municipal hospital). States may well uncover instances of fraud and abuse in the course of preparing federally required audits and which are reflected in these audits. Under the False Claims Act, the first filer of a *qui tam* action forecloses all subsequent claims. 31 U.S.C. § 3730(b)(5). Taken together with the Court of Appeals' decision, what this means for the States is that an individual who does no more than read their publicly available work and file suit based on it may foreclose them from the benefit of their own efforts.

There is also the danger that ongoing investigations may be impeded by opportunistic potential relators trolling state records and reports, available to the public, which might form the basis for a *qui tam* claim. Although many of these materials, as we have said, are available online, other more intrusive avenues are available to obtain public documents, for example, the States' version of the Freedom of Information Act. In Pennsylvania, that is the "Right to Know" law, Pa. Stat. Ann. tit. 65 § 67.101, *et seq.* Other States have similar laws, and the efforts of potential *qui tam* relators through their use has the potential to be harmful and disruptive to ongoing investigations. States are required to create Medicaid Fraud Control Units for example, to which they are required to report incidents of probable fraud. *See* 42 U.S.C. § 1396b(r)(2)(B). Depending on the scope of a State's version of the Freedom of Information Act law, these reports may be available while an investigation is pending. At the least, States will incur a substantial cost in having to respond to requests for information if state reports can be the basis for a *qui tam* action.

The Court can and should avoid these anomalous results by giving the False Claims Act its plain meaning. Reports and audits available to the public are "public disclosure."

CONCLUSION

The Court should reverse the judgments of the Court of Appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-304

IN THE
Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL.,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.
KAREN T. WILSON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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October 26, 2009

QUESTION PRESENTED

Whether an audit and investigation performed by a State or its political subdivision constitutes an "administrative ... report ... audit, or investigation" within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

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INTEREST OF *AMICUS CURIAE*[*]

Amicus Curiae Taxpayers Against Fraud Education Fund ("TAF") is a nonprofit, tax-exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act, has participated in litigation as a *qui tam* relator and as an *amicus curiae*, and has provided testimony to Congress about ways to improve the Act. TAF has a profound interest in ensuring that the Act is appropriately interpreted and applied. TAF strongly supports vigorous enforcement of the Act based on its many years of work focused on the proper interpretation and implementation of the Act.

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[*] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represents that it authored this brief and that no person or entity other than *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus curiae* represents that counsel for all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The question before the Court concerns the meaning of the term "administrative" as it is used in the phrase, "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation." This phrase is part of the False Claims Act's "public disclosure" provision, 31 U.S.C. § 3730(e)(4)(A). Specifically, the Court is asked to decide whether, in that context, the term "administrative" refers only to federal proceedings, or whether it refers more generally to all government proceedings, including those at the state or local level.

The term at the heart of the instant case, "administrative," is inserted between two other terms, "congressional" and "Government Accounting Office," which refer exclusively to federal proceedings. The term "administrative" was inserted

in this particular clause following discussions among various Senators working on two companion pieces of legislation, the False Claims Act and the Program Fraud Civil Remedies Act. The Program Fraud Civil Remedies Act was designed to create a new set of tools through which *federal* agencies could conduct administrative investigations and hearings. There is only one plausible explanation for the insertion of the term "administrative" into that particular clause in the public disclosure provision: Congress must have intended to treat public disclosures resulting from these newly-created federal proceedings in the same manner as public disclosures resulting from the more traditional federal investigative proceedings, namely, congressional or GAO proceedings.

The insertion of the term "administrative" between two terms that refer exclusively to federal

matters, at a minimum presents an ambiguity as to what Congress intended when it employed the word "administrative" in this clause. The development of the Act's public disclosure provision is discussed extensively throughout the statute's legislative history, and in order to give effect to Congress' intent, the Court must look to the legislative history and the purposes Congress sought to achieve when it enacted the provision. Although the "public disclosure" provision consists of a single sentence that has resulted in numerous disputes and lower court decisions, the purpose of the provision has remained clear – to relax the Act's prior, restrictive "government knowledge bar" and encourage more *qui tam* suits, while guarding against parasitic suits filed by opportunistic relators. In an effort to strike the correct balance between these two objectives, Congress limited application of the public disclosure

bar to certain fora that would likely put the federal government – the entity with enforcement rights under the Act – on notice of fraud that impacts the public fisc. State and local reports, audits and investigations rarely put the federal government on notice of federal False Claims Act violations, and were simply not contemplated by Congress as "administrative ... report[s] ... audit[s,] or investigation[s]" within the meaning of the public disclosure bar of the False Claims Act.

If the applicability of the public disclosure bar is restricted to disclosures through various federal proceedings or the news media, it is likely to result in the federal government learning about many fraud allegations that otherwise would escape its attention. Many such cases will bring in valuable information, resulting in significant recoveries, even though the relator may lack direct and independent

knowledge of the fraud, and therefore not qualify as an original source. Conversely, if the public disclosure bar is extended to state administrative proceedings, of which the federal government will rarely be aware, the federal government stands to lose valuable information about fraud upon the federal Treasury.

ARGUMENT

I. THE USE OF THE TERM "ADMINISTRATIVE" TO DESCRIBE CERTAIN REPORTS, AUDITS AND INVESTIGATIONS REFERS TO ONE OF SEVERAL TYPES OF FEDERAL REPORTS AUDITS AND INVESTIGATIONS.

The question presented in this case requires the Court to interpret the False Claims Act's "public disclosure" provision, 31 U.S.C. § 3730(e)(4)(A), to determine whether it encompasses administrative reports, audits, and investigations on both the state and federal level, or only on the federal level. The

public disclosure provision, which has spawned many disputes in the lower courts, is set forth in a single sentence which states: "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person brining the action is an original source of the information."

Petitioners urge the Court to resolve this question by looking at the "plain meaning" of the term "administrative" as it appears in conjunction with the words "report," "audit," and "investigation." Petitioners contend that because that term is not expressly modified by the word "federal," the public

disclosure provision must encompass all administrative reports, audits, and investigations, whether federal or state.

Although Congress did not use the word "federal" to modify "report," "audit," or "investigation," it did describe two federal entities, in addition to administrative agencies, that conduct such proceedings. The Petitioners seek to have the Court ignore this fact, and look only at the plain language of the individual term "administrative." But if the Court followed the suggestion of Petitioners and paid attention only to the "plain language" of the individual terms of the public disclosure provision – and if the Court applied that approach *consistently*, using it to interpret not only the specific term at issue in this case, but instead, the *whole sentence* at issue – this approach would lead to absurd results that Congress did not intend.

For example, by its plain language, the application of the public disclosure bar would be limited to criminal "*hearings*," rather than to all stages of criminal *proceedings*. By Petitioners' logic, Congress could have instead used the word "proceedings" if it intended for the provision to encompass all stages of criminal proceedings, but Congress chose not to do that. According to this logic, then, the disclosure of allegations in a criminal indictment would *not* be covered by the public disclosure bar, since an indictment is not a "hearing," but rather, a different stage of a criminal proceeding. Thus, it would be permissible for a relator simply to copy a criminal indictment from a public record and use that information as the sole basis for a *qui tam* case.

If anything is clear from the history of the False Claims Act, it is that Congress did not intend

such a result when it enacted the public disclosure bar as part of the 1986 amendments. Prior to 1943, relators and their attorneys were engaging in precisely this kind of conduct (*i.e.*, copying criminal indictments and repackaging the allegations as *qui tam* cases) – a practice that the Court criticized but nonetheless found to be lawful in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). The *Hess* decision led directly to the enactment of the 1943 amendment to the False Claims Act barring cases based on information that the Government already possessed. When it enacted the 1986 amendments, Congress sought to relax the jurisdictional bar against cases based on information known to the Government.[1] However, Congress surely did not want to permit the same kind of abusive conduct

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[1] *See Cook County, Illinois v. United States, ex rel. Chandler*, 538 U.S. 119, 133 (2003); *Hughes Aircraft Co. v. United States, ex rel. Schumer*, 520 U.S. 939, 946 (1997).

that it had barred in 1943. Rather, Congress still intended to bar cases that were truly parasitic, *i.e.*, cases where a relator simply copied the federal Government's allegations from a public source and parroted them back in the form of a *qui tam* case. It is not surprising, then, that when interpreting the term "hearing" in the context of the public disclosure provision, lower courts have looked beyond the term's plain meaning and held that although Congress used the narrow term "hearing," it must have intended to use the more expansive term "proceeding."[2]

In the instant case, in order properly to interpret the term "administrative" in accordance with Congress' intent, the Court should look at the

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[2] *See, e.g., United States, ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 652 (D.C. Cir. 1994); *United States, ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1144, 1155 (3d Cir. 1991) (holding that the term "hearing" could encompass other "proceedings").

context in which the term was used, taking into account the legislative history leading up to the enactment of the public disclosure provision, as well as the policies Congress was seeking to advance.

II. THE LEGISLATIVE HISTORY OF THE 1986 AMENDMENTS REFLECTS THAT CONGRESS SOUGHT TO ENCOURAGE THE FILING OF MORE *QUI TAM* SUITS, WHILE LIMITING *QUI TAM* CASES BASED UPON PUBLIC DISCLOSURES THROUGH FEDERAL SOURCES OR THE NEWS MEDIA.

Since the *qui tam* provisions of the False Claims Act were originally enacted in 1863, their primary purpose has always been to give private citizens an incentive to help the federal Government fight fraud against the federal Treasury. By offering significant financial rewards to successful *qui tam* relators, the provisions encourage private citizens to disclose information about fraud to the federal

Government, and to contribute much-needed resources to supplement the Government's own anti-fraud fighting efforts.

The Act's "public disclosure" provision, and its companion, the "original source" exception, enacted as part of the False Claims Amendments Act of 1986 ("1986 amendments"), were not designed to defeat this purpose. Instead, these provisions were enacted for the limited purpose of preventing lawsuits by relators who are truly parasitic: that is, relators who learn of fraud allegations solely from public disclosures originating with the federal Government or news media, and then try to parrot them back to the Government for a profit.

A. The False Claims Act Prior to the 1986 Amendments

Originally enacted in 1863 during the Civil War, the False Claims Act authorized private

individuals, known as "relators," to bring a "*qui tam*" suit on behalf of the United States to redress fraud against the Government. The Act provided for double damages and a $2,000 civil penalty per false claim. A relator who successfully pursued a claim was entitled to one half of the Government's recovery. The Act did not authorize the Government to intervene in the relator's case, nor did the Act preclude *qui tam* actions based upon the source of the relator's information.[3]

During the 1940s, relators and their lawyers were engaging in the practice of copying fraud allegations from criminal indictments and, solely on the basis of that information, filing *qui tam* lawsuits. These lawsuits were truly parasitic in that the relators were taking information from the "host," the federal Government, and seeking to profit at the

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[3] Act of March 2, 1863, ch. 67, 12 Stat. 696.

Government's expense, while providing nothing useful in return. In 1943, the Supreme Court upheld this unsavory practice in *Hess*, 317 U.S. at 537. Later that year, Congress amended the False Claims Act to include a "government knowledge" bar. The "government knowledge" bar strictly precluded any *qui tam* lawsuit based on evidence or information that was already in the possession of the Government, regardless of whether the *qui tam* relator had been the source of the Government's information in the first place.[4]

Following the 1943 amendment, courts construed the False Claims Act to bar *qui tam* actions that were in no sense parasitic.[5] Henceforth, the *qui tam* provisions of the False Claims Act were

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[4] Act of Dec. 23, 1943, Pub. L. No. 78-213, ch. 377, 57 Stat. 608.

[5] *See, e.g., United States v. Pittman*, 151 F.2d 851 (5th Cir. 1949); *United States v. Rippetoe*, 178 F.2d 735 (4th Cir 1949); *United States, ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984); *United States, ex rel. Lapin v. Int'l Bus. Machs. Corp.*, 490 F. Supp. 244 (D. Haw. 1980).

rarely used. This helped set the stage for Congress to reconsider the "government knowledge" bar as part of its efforts to overhaul and modernize the False Claims Act in 1986.

B. The House and Senate Bills Leading to the 1986 Amendments

The 1986 amendments originated from two parallel legislative proposals: H.R. 4827 ("the House Bill"), and S. 1562 ("the Senate Bill"). The House Bill was reported out of the House Judiciary Committee along with a Report ("the House Report") dated June 26, 1986.[6] The Senate Bill, first introduced by Sen. Charles Grassley in August 1985, was reported out of the Senate Judiciary Committee accompanied by a Report ("the Senate Report") dated July 28, 1986.[7] Although the statute eventually

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[6] H.R. Rep. No. 660, 99th Cong., 2d Sess. (1986) ("H.R. Rep.").
[7] *See* S. Rep. No. 345, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 5266 ("S. Rep.").

enacted by Congress was different in significant respects from both proposals, the two reports reveal the concerns that Senate and House members had with the pre-1986 Act.

A central theme throughout both reports was the need to increase the incentives for whistleblowers to file *qui tam* lawsuits. *Qui tam* lawsuits, according to both reports, would serve two important purposes: (1) to bring the Government new, inside information about fraud;[8] and (2) to supplement the Government's inadequate law enforcement resources with the enforcement efforts of private attorneys general.[9] Both the Senate Bill and the House Bill sought to repeal the existing "government knowledge" bar against certain *qui tam* suits and substituted some form of a "public

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[8] *See* S. Rep. at 2, *reprinted in* 1986 USCCAN at 5267; H.R. Rep. at 23-24.

[9] *See* S. Rep. at 7-8, *reprinted in* 1986 USCCAN at 5272-73; H.R. Rep. at 22-24.

disclosure" bar.

1. The House Bill and Report

Under the House Bill, a relator would have been barred from bringing an action when the action: "(i) is based on specific evidence or specific information which the Government disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding; or (ii) is based on specific information disclosed during the course of a congressional investigation or based on specific public information disseminated by any news media." Even if the case met those criteria, the action would not be dismissed if the Government proceeded with the action, or if the Government possessed the information on which the lawsuit was based for six months and failed to act on it.[10] Consistent with way that term is used throughout

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[10] H.R. Rep. at 2-3.

the False Claims Act, the term "Government" referred to the United States Government.

In discussing this proposal, the House Report stated:

> The Committee recognizes the validity of the reasons for enactment of the 1943 amendments. Nevertheless, the Committee is concerned that there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action. Therefore, H.R. 4827 contains a provision which states that a *qui tam* action which is based solely on public information, such as congressional hearings, the news media, or criminal indictments, shall be dismissed. However, if the Government had had the information for six months before the *qui tam* action was filed, the section provides that the *qui tam* suit shall not be dismissed solely because the Government has not brought the case.
>
> As an additional deterrent to

> unwarranted suits, the bill also provides that when a *qui tam* suit is based solely on public information, the award available to the relator may not exceed 10%. This limitation applies only to *qui tam* cases in which the Government enters the suit.[11]

The House Report also discussed the fact that the Government often lacked the resources to pursue fraud allegations.[12] Accordingly, the House Report stated that "the Committee bill expands the role of the relator so that when the Government enters an action filed by a relator, the relator remains a party to the suit ... ."[13]

2. The Senate Bill and Report

The Senate Bill, S. 1562, also would have repealed the 1943 Government knowledge bar and replaced it with a different jurisdictional limitation

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[11] *Id.* at 22-23 (emphasis added).
[12] *Id.* at 23.
[13] *Id.* at 24.

similar to the one in the House Bill. The Senate Bill's limitation was to be codified at 31 U.S.C. § 3730(e)(4), which would have read:

> In no event may a person bring an action under this section based upon allegations or transactions which are the subject of a civil suit in which the Government is already a party, or within six months of the disclosure of specific information relating to such allegations or transactions in a criminal, civil, or administrative hearing, a congressional or Government Accounting Office report or hearing, or from the news media.[14]

The Senate Bill called for an award structure under which a relator would be guaranteed between 10 and 20 percent of the proceeds in cases where the Government intervened, and between 20 and 30 percent where the Government declined to

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[14] S. Rep. at 43.

intervene.[15] The Senate Bill also sought to restrict a relator's recovery to a maximum of 10 percent where the lawsuit was "based solely on specific information relating to allegations or transactions in a criminal, civil, or administrative hearing, a congressional or Government Accounting Office report or hearing, or from the news media," with the award depending on the relator's role in advancing the case to litigation.[16]

In discussing the Senate Bill, the Senate Report echoed the concerns expressed in the House Report about the need to enhance the incentives for citizens to participate in law enforcement efforts to combat fraud. The Senate Report described a "conspiracy of silence" among employees of government contractors, noting that an employee who is aware of fraud is often faced with "the

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[15] *Id.* at 42.
[16] *Id.* at 42-43.

difficult choice of either keeping quiet" about the fraud "or risking the loss of his job."[17] The Senate Report stated that the "proposed legislation seeks ... to encourage any individual knowing of Government fraud to bring that information forward."[18] The Senate Report noted that *qui tam* suits could increase the detection of fraud by enlisting "the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity."[19]

The Senate Report also noted that *qui tam* suits could serve another important purpose, by providing additional private resources to assist the Government in the actual prosecution of fraud cases. Noting the lack of Government resources available to fight fraud, and the frequency with which valid

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[17] *Id.* at 5, *reprinted in* 1986 USCCAN at 5270.
[18] *Id.* at 2, *reprinted in* 1986 USCCAN at 5267.
[19] *Id.* at 4, *reprinted in* 1986 USCCAN at 5269.

allegations are simply "left unaddressed at the outset" because of a scarcity of Government resources, the Senate Report concluded: "The Committee believes that the amendments in S. 1562 which allow and encourage assistance from the private citizenry can make a significant impact on bolstering the Government's fraud enforcement effort."[20]

The Senate Report also discussed the proposed jurisdictional bar, stating:

> Subsection (d)(4) provides that a court may award up to 10 percent of an action's proceeds to persons bringing suits based on public information. The award ranges specified in (d)(1) and (2) do not apply to *qui tam* relators whose false claims disclosures were derived solely from public hearings, reports, or the news media. New subsection (e)(4) of section 3730 prohibits a suit based solely on

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[20] *Id.* at 7-8, *reprinted in* 1986 USCCAN at 5272-73.

> previous public disclosures unless the Government has failed to act within 6 months of the public disclosure. The Committee recognizes that guaranteeing monetary compensation for individuals in this category could result in inappropriate windfalls where the relator's involvement with the evidence is indirect at best. However, in the event an action of this type results in a Government recovery, subsection (d)(4) provides that the court may award up to 10 percent of the proceeds, taking into account the significance of the information and the role of the person in advancing the case to litigation. The Committee believes that a financial reward is justified in these circumstances if but for the relator's suit, the Government may not have recovered.[21]

3. The Senate Amendments

The Senate Bill that was reported out of the Judiciary Committee (the "Senate Committee Bill")

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[21] *Id.* at 28, *reprinted in* 1986 USCCAN at 5293.

never reached the floor of the Senate. Instead, on July 28, 1986, Senators Grassley, Hatch, Cohen, and Thurmond reached a compromise that resulted in changes to two pieces of legislation: S. 1562 amending the False Claims Act, and a companion statute, S. 1134, that would create a new law known as the Program Fraud Civil Remedies Act ("PFCRA").

For purposes of the instant case, the Senate compromise of July 28, 1986 is perhaps the most significant event in the legislative history. On that day, the senators modified the "public disclosure" provision, dropping the six-month waiting period and dividing the earlier version into three parts. The first part, § 3730(e)(4) (later changed to § 3730(e)(5)), consisted of the bar against *qui tam* suits based on allegations that were already the subject of a pending lawsuit in which the Government was a

party. The second part, § 3730(e)(5)(A) (later changed to § 3730(e)(4)(A)), stated:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

The third part, § 3730(e)(5)(B) (later changed to § 3730(c)(4)(B)), the precursor of the "original source" provision, stated:

> For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily informed the Government or the news media prior to an action filed by the

Government.[22]

Prior to the July 27 compromise, the public disclosure provision would have barred *qui tam* lawsuits "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, *a congressional or Government Accounting Office report or hearing*, or from the news media...." (emphasis supplied). As the result of the July 27 compromise, however, the italicized language was changed to the following: *"a congressional, **administrative**, or Government Accounting Office report, hearing, **audit**, or **investigation***" (emphasis supplied).

Why was the public disclosure provision modified to include the new terms "administrative," "audit," and "investigation"? The only plausible explanation lies in the fact that the Senate

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[22] *132 Cong. Rec. 17,936 (1986).*

compromise of July 27 involved not just one statute, but *two* statutes that were designed to operate in tandem: the False Claims Act and the Program Fraud Civil Remedies Act.[23] The PFCRA was a statute that would grant powerful new tools to *federal Government agencies* to conduct, among other things, *audits and investigations*. It was natural, then, for the Senators who were crafting these new tools to ensure that – for purposes of the public disclosure provision that they were writing at the very same time – any public disclosures resulting from the use of these tools would be treated the same as public disclosures from other traditional federal investigatory tools, namely, congressional or GAO reports or hearings.

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[23] *See Vermont Agency of Nat. Res. v. United States, ex rel. Stevens*, 529 U.S. 765, 786 n.17 (2000) ("[T]here is no question that the PFCRA was designed to operate in tandem with the FCA. Not only was it enacted at virtually the same time as the FCA was amended in 1986, but its scope is virtually identical to that of the FCA."

On August 11, 1986, the Senate considered and passed the Senate Bill in its modified form resulting from the July 27 compromise.[24] In a contemporaneous comment about the new public disclosure and original source provisions, Senator Grassley stated: "The use of the term 'Government' in the definition of original source is meant to include any Government source of disclosures cited in subsection (5)(a); that is, Government includes Congress, the General Accounting Office, any executive or independent agency as well as all other governmental bodies that may have publicly disclosed the allegations."[25] It is clear that when Senator Grassley refers to the "Government," he means the *federal* Government, since the term "Government" is used interchangeably with "United

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[24] 132 Cong. Rec. 20,530 (Aug. 1986).
[25] *Id.* at 20,536 (statement of Sen. Grassley).

States" throughout the text of the False Claims Act.

The modified version of the Senate Bill was put to a vote and passed by the Senate on August 11, 1986.[26]

4. The House Bill Passed on September 9, 1986

The bill reported out of the House Judiciary Committee underwent some minor modifications and then was brought to the House floor on September 9, 1986.[27] The jurisdictional bar was identical to the version reported out of the House Judiciary Committee. During the brief debate on the bill, several Representatives reiterated the theme that the amendments would strengthen the incentives for private citizens to file *qui tam* lawsuits through various means – *i.e.*, by increasing the relator's participation in such lawsuits, providing guaranteed

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[26] *Id.* at 20,537-20,542.

[27] *See id.* at 22,330-22,335.

minimum awards, and creating statutory protections against employer reprisals.[28]

The House considered and passed H.R. 4827 on September 9, 1986.[29] The House then considered S. 1562, which the Senate had passed on August 11, 1986. The House struck the text from S. 1562 and, in its place, substituted the text from H.R. 4827, which the House had just approved. The House then voted on S. 1562 as amended; S. 1562, which now incorporated verbatim the text of H.R. 4827, was passed by the House.[30]

5. The House and Senate Compromise

After the House passed S. 1562 using the text from H.R. 4827, there was an informal conference between House and Senate negotiators. According to

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[28] *See, e.g., id.* at 22,336 (statement of Rep. Brooks); *id.* at 22,339 (statement of Rep. Berman); *id.* at 22,340 (statement of Rep. Bedell).

[29] *Id.* at 22,340.

[30] *Id.* at 22,340-22,345.

Sen. Grassley, the Senate and House negotiators "met and reconciled the differences between S. 1562 as passed by the Senate and S. 1562 as amended and passed by the House."[31]

The Senate and House made several compromises with respect to the *qui tam* provisions. Congress adopted a modified version of the House proposal under which relators would remain parties to *qui tam* lawsuits even after the Government intervened, subject to the court's ability to limit the relator's participation in certain circumstances.[32] Congress also agreed to adopt the House's award structure, under which the relator would ordinarily receive 15-25 percent of the proceeds if the Government intervened and 25-30 percent if the Government declined to intervene.[33] Also, the

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[31] *Id.* at 28,580 (statement of Sen. Grassley).
[32] *Id.* at 28,575-28,576.
[33] *Id.* at 28,576.

Senate and House agreed to adopt the Senate's limitation of 10 percent for awards to relators whose actions were based "primarily" on certain prior disclosures of information.[34]

Most importantly, the Senate and House also agreed to adopt the Senate's "public disclosure" provision, with a slight change to the definition of "original source." In the final version of the statute, an "original source" was required to disclose the information on which the suit was based to the *Government* prior to *the relator's* filing the lawsuit.[35]

Because there was no formal conference committee to reconcile the conflicting versions of the legislation, there is no conference committee report

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[34] *Id.* at 28,576. The earlier House version had limited recoveries for relators whose actions were based "solely" on such disclosures. *See id.* at 22,331.

[35] *Id.* Under the earlier version that was passed by the Senate on August 11, 1986, an "original source" was required to disclose the information to the government or the news media prior to the Government's filing a lawsuit. *See id.* at 20,531.

that would explain the final bill agreed to by the House and Senate negotiators. However, Rep. Berman, the principal House author of the 1986 amendments, introduced into the Congressional Record for October 7, 1986, a statement about the *qui tam* provisions. Rep. Berman stated:

> The final bill has adopted the Senate version of who may file an action under the False Claims Act. Before the relevant information regarding fraud is publicly disclosed through various Government hearings, reports and investigations which are specifically identified in the legislation or through the news media, any person may file such an action as long as it is filed before the Government filed an action based upon the same information. Once the public disclosure of the information occurs through one of the methods referred to above, then only a person who qualifies as an "original source" may bring the action.[36]

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[36] *Id.* at 29,322 (statement of Rep. Berman).

Because the term "Government" is used interchangeably with "United States" throughout the False Claims Act, and only the *federal* Government can file an action under the Act, Rep. Berman is presumably referring only to the *federal* "Government" when he uses that term.

The Senate passed the final version of the 1986 amendments on October 3, 1986.[37] That version was enacted by the House on October 7, 1986.[38] President Reagan signed the False Claims Amendments Act of 1986 into law on October 27, 1986.[39]

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[37] *Id.* at 28,575-28,580.

[38] *Id.* at 29,315-29,323.

[39] False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986), *codified at* 31 U.S.C. §§ 3729-3733.

C. The 1986 Amendments were Intended to Lower the Barriers Against Qui Tam Suits while Continuing to Bar Truly Parasitic Ones

The False Claims Amendments Act of 1986 substantially altered many aspects of the *qui tam* provisions.[40] The amended statute granted relators the right to continue to participate as party plaintiffs even though the Government had intervened in the lawsuits.[41] The new law also guaranteed that, in cases where the Government intervened, the relator would receive a minimum of 15 percent of the proceeds, and as much as 25 percent, depending on the relator's contributions to the prosecution;[42] where the Government declined to intervene, the relator was guaranteed between 25 and 30 percent of

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[40] *Id.*
[41] 31 U.S.C. § 3730(c)(1).
[42] *Id.* at § 3730(d)(1).

the proceeds.[43] The amended statute also repealed the strict bar against lawsuits based upon evidence or information already possessed by the Government. Instead, the Act prohibited cases based upon certain kinds of public disclosures of information, unless the relator was an "original source."[44]

The 1986 amendments were designed to make the Act a more useful tool for fighting fraud by, among other things, easing the jurisdictional barriers against *qui tam* suits.[45] The changes to the *qui tam* provisions reflected an effort by Congress to "establish a solid partnership between public law enforcers and private taxpayers."[46] By repealing the

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[43] *Id.* at § 3730(d)(2).

[44] *Id.* at § 3730(e)(4).

[45] *Cook County, Illinois v. United States, ex rel. Chandler*, 538 U.S. 119, 133 (2003).

[46] 132 Cong. Rec. S15036 (Oct. 3, 1986) ("Primary in the original 'Lincoln Law' as well as this legislation is the concept of private citizen assistance in guarding taxpayer dollars. The expanded qui tam provisions of this bill will serve to establish a solid partnership between public law enforcers and private

"government knowledge" bar and replacing it with a "public disclosure" bar, Congress intended to prevent truly parasitic lawsuits while permitting lawsuits that were likely to bring good new information, as well as additional prosecutorial resources, to the federal Government.[47]

III. THE PUBLIC DISCLOSURE PROVISION WAS NOT INTENDED TO BAR A *QUI TAM* CASE BASED UPON THE PUBLIC DISCLOSURE OF ALLEGATIONS IN AN ADMINISTRATIVE REPORT, AUDIT, OR INVESTIGATION CONDUCTED BY A NON-FEDERAL AGENCY.

When it enacted the 1986 amendments, Congress recognized that the decision to file a *qui tam* case very often involves great personal risks to career, income, savings, family, friendship, and in

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taxpayers in the fight against fraud.") (statement of Sen. Grassley).

[47] *See United States, ex rel. S. Prauer v. Fleet Bank of Me.*, 24 F.3d 320, 324-26 (1st Cir. 1994).

some cases, even personal safety.[48] Before deciding whether to take these risks, potential *qui tam* relators and their counsel must take into consideration the possibility that their lawsuits may be dismissed because of the public disclosure bar. If the public disclosure bar is interpreted in an expansive manner so that it covers disclosures made in obscure state or local government proceedings, this will inevitably result in fewer people willing to become *qui tam* relators. This effect will be magnified if, as the majority of lower courts have incorrectly held, a lawsuit is deemed to be "based upon" any prior public disclosure of a similar allegation regardless of whether the relator knew about the public disclosure and actually derived *qui tam* claims from that disclosure.[49]

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[48] *See S.Rep.* at 5-6, *reprinted in* 1986 USCCAN at 5270-71.

[49] *See, e.g., United States ex rel. Mistick v. Housing Auth.*, 186 F.3d 376, 388 (3d Cir. 1999); *United States ex rel. Boothe v. Sun*

The legislative history demonstrates Congress' concern that, if fewer people were willing to take the risk of filing a *qui tam* suit, the federal Government would have fewer opportunities to learn about fraud against the Treasury. For that reason, Congress did *not* intend for the public disclosure provision to bar suits that were likely to contribute to the Government's knowledge about, or ability to pursue, fraud claims.[50] The bar was meant to apply to situations in which a relator's complaint was based upon the public disclosure of allegations or transactions in a *limited* set of Government proceedings or the news media, *i.e.*, circumstances where federal law enforcement officials were most likely to learn about and investigate the allegations.

Healthcare Group, Inc., 496 F.3d 1169, 1171-72 (10th Cir. 2007); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 684-85 (D.C. 1997); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992).

[50] *See In re Natural Gas Royalties, ex rel. United States v. Exxon Co., USA*, 566 F.3d 956, 963 (10th Cir. 2009).

Congress had no reason to assume that the disclosure of fraud allegations in local government proceedings,[51] or even private lawsuits,[52] would put the federal Government on sufficient notice of the fraud allegations so that federal law enforcement officials would be likely to pursue them.

Congress could have made the public disclosure bar *generally* applicable to cases based on any kind of publicly available information. Instead, Congress chose to limit its application to disclosures in certain types of fora, *i.e.*, the kinds of disclosures that were likely to trigger a federal law enforcement investigation without any need for a *qui tam* relator.

Some have argued that "parasitic" relators are the only ones affected by an expansive interpretation of the public disclosure bar, because "true

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[51] *See, e.g., A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1244 (9th Cir. 2000).

[52] *See, e.g., United States, ex rel. Gebert v. Trans. Admin. Servs.*, 260 F.3d 909 (8th Cir. 2001).

whistleblowers" who have first-hand knowledge of a fraud will be covered by the "original source" exception.[53] This argument twists the meaning of the term "parasite," and it also misses an important point. A "parasite" is an organism that takes something of value from a host and returns nothing of value back to the host.[54] A relator who gathers information from public, non-federal and non-news media sources and provides it to the federal Government is not a "parasite." By contrast, in this situation, a relator can offer a useful service by providing the Government with information it otherwise would not have obtained.

Congress created a two-tiered system in § 3730(e)(4), under which a *qui tam* suit is be barred

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[53] *See* Brief of *Amici Curiae* the Washington Legal Foundation and the Allied Educational Foundation in Support of Petitioners, at 16-18 (September 3, 2009).

[54] *United States, ex rel. S. Prawer v. Fleet Bank of Me.*, 24 F.3d at 327-28.

(a) only if it is based upon certain kinds of public disclosures, and (b) even then, the lawsuit may go forward if the relator is an "original source." Congress created this two-tiered system in recognition of the fact that in many instances, the Government stands to benefit from *qui tam* cases that are brought by relators who do not have "direct and independent knowledge" of the fraud scheme. Even when the relator is not an "insider" to or "close observer" of the fraud, the relator is often in a position to learn and report something that would otherwise have escaped the attention of federal law enforcement officials. Many of these cases have merit and result in the United States reaping significant financial recoveries.

For example, James Alderson was a non-insider whose *qui tam* lawsuit and exposure of healthcare fraud directly led to the return of more

than $85 million to the federal Treasury.[55] Alderson was employed as the Chief Financial Officer for a small hospital in Montana. When the hospital's new management company directed Alderson to prepare two sets of Medicare cost reports – an "aggressive" report to submit for Medicare reimbursement, and a "reserve" report for submission to the company's auditors – he refused and was terminated from his job. Alderson filed a wrongful termination lawsuit against the hospital, and during the course of discovery in that case, he discovered that the Medicare fraud scheme he was asked to participate in was a widespread practice, encouraged by much larger healthcare management companies. He subsequently filed his *qui tam* suit.[56] Alderson's case proves that non-insider relators need

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[55] *See United States, ex rel. Alderson v. Quorum Health Group, Inc.*, 171 F. Supp. 2d 1323, 1324-25 (M.D. Fla. 2001).
[56] *See id.*

not be parasites; rather, they can be essential to False Claims Act prosecutions.

It is the rare case where federal law enforcement officials will learn about fraud allegations through the public disclosure of a state or local administrative report, hearing, audit, or investigation. For that reason, a relator can provide a useful service to the Government by filing a *qui tam* case based on the public disclosure of such allegations, even though the relator may not have direct and independent knowledge of the fraud scheme. If the Department of Justice finds that a relator's allegations are not worth pursuing, then it can decline to do so. Congress intended that the Department of Justice should at least be given the opportunity to make that decision.

CONCLUSION

For the reasons set forth herein, as well as any others that appear just to the Court, *amicus curiae* respectfully asks this Court to affirm the decision of the United States Court of Appeals for the Fourth Circuit, and to hold that the "public disclosure" provision does not encompass public disclosures in state or local administrative reports, hearings, audits, or investigations.

October 26, 2009

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AMICUS CURIAE BRIEF

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(15)

No. 08-304

IN THE

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GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, *ET AL.*,

Petitioners,

v.

UNITED STATES *EX REL.* KAREN T. WILSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether an audit and investigation performed by a State or its political subdivision constitutes an "administrative . . . report . . . audit, or investigation" within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

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IN THE

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BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting a limited and accountable Government, supporting the free

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[1] In accordance with this Court's Rule 37, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this brief, as reflected in letters lodged with the Clerk of the Court.

enterprise system, and opposing abusive enforcement actions and civil litigation by the Government and private litigants. WLF regularly participates in important constitutional and statutory litigation raising these issues.

WLF has appeared before this Court and other federal courts in several cases raising significant issues regarding the civil False Claims Act ("FCA" or "the Act"), 31 U.S.C. § 3729 *et seq.* *See, e.g.*, *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008); *R & F Props. of Lake County, Inc. v. United States ex rel. Walker, cert. denied*, 549 U.S. 1027 (2006); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Boeing Co. v. United States ex rel. Kelly, cert. denied*, 510 U.S. 1140 (1994); *Riley v. St. Luke's Episcopal Hosp.*, 196 F.3d 514 (5th Cir. 1999).

In addition, WLF's Legal Studies Division produces and distributes legal public policy publications on numerous topics, including the FCA. *See, e.g.*, J. Andrew Jackson & Edward W. Kirsch, *The* Qui Tam *Quagmire: Understanding the Law in an Era of Aggressive Expansion* (WLF Monograph) (1998); J. Andrew Jackson, *A Law Gone Rogue: Time to Return Fairness to the False Claims Act* (WLF Legal Backgrounder) (Dec. 16, 2005).

The Allied Educational Foundation ("AEF") is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in legal reform and public policy. AEF has appeared as co-*amicus* with WLF in numerous cases before the Supreme Court on a broad array of public interest and legal policy issues.

Amici curiae submit that, over the last two decades, excessive FCA activity has spawned abusive punitive litigation against businesses, both large and small, to the detriment of those businesses, their employees, and their shareholders as well as to the public at large.

The FCA's *qui tam* provisions encourage private individuals with knowledge of fraud perpetrated against the United States Treasury to come forward and sue on behalf of the United States. To encourage whistleblowers (known as *qui tam* relators) to come forward and expose such fraud, the Government pays a bounty of up to 30% of all recoveries. In other words, the FCA's *qui tam* provisions essentially allow the Government to "purchase" from private individuals the information they may have about fraud on the United States Treasury. *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 309 (5th Cir. 1999).

The potential bounties available under the FCA's *qui tam* provisions make this mechanism susceptible to abuse by opportunistic bounty hunters masquerading as true whistleblowers. One of the most effective bars to such parasitic lawsuits has been the jurisdictional public disclosure bar that Congress crafted in the 1986 amendments to the FCA. This public disclosure bar is a core feature of *qui tam* enforcement of the FCA, and it requires dismissal of *qui tam* suits where the *qui tam* relator's case is based on publicly disclosed information and the relator is not an original source to the Government.

In holding that state reports, hearings, audits, or investigations can *never* qualify as "public disclosures" for purposes of the FCA's public disclosure bar, the court of appeals below adopted a *per se* rule that is contrary to the text of the statute, the purpose of the public disclosure bar, and the position of a majority of the circuit courts that have considered this question. Because "public disclosure" is the trigger for determining jurisdiction, this misguided "rule" adopted by the court of appeals will allow cases based on publicly known information to proceed even though the relator does not qualify as an "original source." *Amici* believe that this brief will bring an additional perspective to the issue presented in this case and will assist the Court in determining whether state reports, hearings, audits, or

investigations may qualify as "public disclosures" to bar parasitic *qui tam* lawsuits.

SUMMARY OF ARGUMENT

The history of the FCA evidences Congress's attempt to balance the encouragement of true whistleblowing activity and the discouragement of opportunistic behavior. Indeed, Congress established the public disclosure bar in 1986 for the purpose of preventing parasitic lawsuits by *qui tam* relators bringing suits based on information readily available to the Government or the public. Since 1986, there have been numerous divergent interpretations of various aspects of this jurisdictional bar, a bar that goes to the very heart of a federal court's competence to hear a *qui tam* suit. *See Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1405-06 (2007); *see also Hughes Aircraft Co.*, 520 U.S. at 951.

In this case, the Court is called upon to address the first prong of the FCA's public disclosure bar by clarifying what types of disclosures qualify as "public disclosures" and to resolve a clear conflict among the courts of appeals.[2] In

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[2] Two courts of appeals, the Third Circuit and the Fourth Circuit (in the case below), have held that state reports, audits, or investigations never can serve as "public disclosures" for purposes of the FCA's public disclosure bar. *See United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 745-46 (3d Cir. 1997); *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292, 306-07 (4th Cir. 2008). The Eighth, Ninth, and Eleventh Circuits have reached the opposite conclusion and have held that state reports, audits, or investigations can qualify as "public disclosures." *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir.), *cert. denied*, 540 U.S. 877 (2003); *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917-18 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 1119 (2008); *Battle v. Bd. of Regents*, 468 F.3d 755, 762 (11th Cir. 2006).

holding that state reports, hearings, audits, or investigations can *never* qualify as FCA "public disclosures," the court of appeals below adopted a rule contrary to the text of the statute, the purpose of the jurisdictional bar, the position of a majority of the circuit courts that have considered this issue, and common sense.

The Fourth Circuit's holding is contrary to the text of the public disclosure bar. The Fourth Circuit misapplies the doctrine of *noscitur a sociis* by dividing the provision into three categories and then applying the doctrine, in isolation, to only one of the categories. However, by examining the public disclosure provision in its entirety, it is clear that Congress did not intend to — and did not in fact — limit the types of "public disclosures" to federal sources. The Fourth Circuit's *per se* rule fails to take into consideration any other key factors, including the nature, scope, subject, and circulation of the state or local information.

Moreover, by limiting the second category to federal sources, the Fourth Circuit frustrates one of the key purposes of the public disclosure bar, which is to prevent parasitic lawsuits by *qui tam* relators who learn of fraud through public channels. Whether a parasitic *qui tam* relator learns of fraud from a state source or a federal source, the result should be the same in that the relator is not entitled to obtain a share of the Government's damages where the relator simply echoes information already in the public domain.

Finally, holding that state sources qualify as "public disclosures" would have no effect on the Government's ability to pursue FCA cases because the public disclosure bar is intended to encourage, not bar, FCA suits by the Government. Moreover, such a holding would not discourage true whistleblowers from filing FCA suits because such whistleblowers could show themselves to be "original sources" under the second prong of the public disclosure bar.

The decision below is demonstrably wrong. It improperly exempts from the jurisdictional bar an entire category of "public disclosures" even though the information was undoubtedly "public" and indisputably "disclosed." It allows certain *qui tam* cases to go forward even where Congress intended to strip federal courts of jurisdiction to hear those cases unless the case is brought by the Attorney General or an "original source." Respectfully, the Fourth Circuit's statutory analysis is flawed and its understanding of the purpose of the public disclosure bar incomplete. This Court should reverse the judgment below.

ARGUMENT

I. CONGRESS INTENDED THE PUBLIC DISCLOSURE BAR TO PREVENT PARASITIC LAWSUITS BY *QUI TAM* RELATORS WHO LEARNED OF FRAUD THROUGH PUBLIC SOURCES

"The history of the FCA qui tam provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994). In 1986, after over 100 years of living with two very different extremes — one (before 1943) that allowed parasitic *qui tam* relators to cut and paste (literally) allegations from the Government's own pleadings and another (after 1943) that disallowed *qui tam* suits where the Government had knowledge of the information even if the relator was the Government's source — Congress forged a more balanced approach to screening for proper *qui tam* relators when it enacted the "public disclosure" bar codified in 31 U.S.C. § 3730(e)(4).

This provision states in full:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [sic] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).[3]

To understand fully what this provision was designed to do, it is important to understand the history of the FCA's *qui tam* provisions and what led Congress to include the public disclosure bar in the 1986 amendments.[4]

As originally drafted, the FCA's *qui tam* provisions were very permissive, as well illustrated by *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), in which an enterprising *qui tam* relator made a direct copy of a criminal indictment, incorporated those allegations in a civil action under the FCA, and requested his statutory share (then half) of any subsequent civil judgment. *Id.* at 545. The relator ultimately prevailed in this Court based on the text of the

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[3] An "original source" for purposes of Section 3730(e)(4) is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). *See Rockwell*, 127 S. Ct. at 1403. The "original source" analysis is wholly separate from the public disclosure analysis and only comes into play if there indeed is a "public disclosure" within the meaning of Section 3730(e)(4)(A).

[4] The recent amendments to the FCA did not change the language in the public disclosure provision. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617.

statute at the time. In response, Congress quickly amended the FCA to bar *qui tam* actions "based on evidence or information the Government had when the action was brought." Act of Dec. 23, 1943, Pub. L. No. 78-213, ch. 377, 57 Stat. 608.

Nearly 40 years later, the pendulum had swung the other way, as illustrated in *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984). In that case, the court of appeals refused to allow the State of Wisconsin to act as a *qui tam* relator in a Medicaid fraud action (even though the investigation had been conducted solely by Wisconsin and the Federal Government learned of the fraud only because Wisconsin had reported it) because, the court held, the FCA barred *qui tam* actions "whenever the government has knowledge of the 'essential information upon which the suit is predicated' before the suit is filed, even when the plaintiff is the source of that knowledge." *Id.* at 1103.

Whereas the *Marcus* case was responsible for the 1943 amendments to the FCA, the *Dean* case was a key motivator for the 1986 amendments. There should be no doubt that Congress was keenly aware of both extremes — as illustrated by the *Marcus* and *Dean* cases — and used this history to shape what would become the public disclosure bar in the 1986 amendments to the FCA. As the Third Circuit has observed, with the 1986 amendments, Congress's "principal intent . . . was to have the *qui tam* suit provision operate somewhere between the almost unrestrained permissiveness represented by the *Marcus* decision . . . and the restrictiveness of the post-1943 cases, which precluded suit even by original sources." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991) (internal citations omitted).

Thus, while the immediate impetus for Congress to add the public disclosure bar to the FCA in 1986 was the *Dean* decision, it must be recognized that, in stepping back from

that extreme, Congress endeavored to avoid a return to the other equally undesirable extreme — allowing parasitic *qui tam* relators to bring suits based on information readily available to the Government or the public. The new public disclosure bar was designed, as one court has explained, to obtain "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995) (internal quotation marks and citation omitted); *see also United States ex rel. Devlin v. State of Cal.*, 84 F.3d 358, 362 (9th Cir. 1996) (public disclosure bar intended "to bar parasitic suits through which a plaintiff seeks a reward even though he has contributed nothing significant to the exposure of fraud").

Under Section 3730(e)(4)(A), the first step in the public disclosure inquiry is for a court to determine whether the *qui tam* relator's complaint is based on allegations or transactions that have been publicly disclosed. Several circuit courts have noted that this initial analysis is meant to be a "quick trigger" test that, if necessary, will lead to the more nuanced "original source" analysis required under Section 3730(e)(4)(B). *See Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1476 n.18 (9th Cir. 1996); *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 568 n.10 (11th Cir. 1994) (per curiam); *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 552-53 (10th Cir. 1992). For this reason, courts have held that a "public disclosure" need only be sufficient to have "set the government squarely on the trail of the alleged fraud," *Fine*, 70 F.3d at 571, or to have raised the "specter of 'foul play,'" *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 687 (D.C. Cir. 1997), in order to trigger the jurisdictional bar. But a proper interpretation of "public disclosure" is also important because, if information is not found to be "publicly disclosed," then a relator who is not a

true whistleblower — not an "original source" — is allowed to bring the case. Furthermore, because of the FCA's "first to file" provision, 31 U.S.C. § 3730(b)(5) , a parasitic relator who wins the race to the courthouse bars a *qui tam* suit by a true whistleblower.

II. THE FOURTH CIRCUIT'S *PER SE* RULE IS CONTRARY TO THE TEXT AND PURPOSE OF THE PUBLIC DISCLOSURE BAR AND MUST BE REJECTED

The FCA's public disclosure bar only comes into play if the purported disclosure qualifies as a "public disclosure." Section 3730(e)(4)(A) can be roughly divided into three categories of "public disclosures":

Category 1: "a criminal, civil, or administrative hearing";

Category 2: "a congressional, administrative, or Government [sic] Accounting Office report, hearing, audit, or investigation"; and

Category 3: "the news media."

31 U.S.C. § 3730(e)(4)(A). The interpretation adopted by the court of appeals below imposes an extra-textual, bright line rule for Category 2: The court's rule prohibits a *state* audit report or investigation from qualifying as a "public disclosure" regardless of any other factors, including the scope, nature, subject, or circulation of the state report.

The principal basis for the Fourth Circuit's *per se* rule was the court's mistaken belief that the doctrine of *noscitur a sociis* required the adjective "administrative" in Category 2 to mean "federal administrative," thus restricting Category 2 only to federal "administrative . . . reports, hearings, audits, or investigations." *Wilson*, 528 F.3d at 302. The court also reasoned that the public disclosures identified in Category 2 should be limited to "federal" sources because of the purpose

behind the public disclosure bar. *Id.* at 302-07. Respectfully, the Fourth Circuit's statutory analysis is flawed and its understanding of the purpose of the public disclosure bar incomplete.

A. THE RULES OF STATUTORY CONSTRUCTION SHOULD NOT BE USED TO DIVORCE THE PUBLIC DISCLOSURE BAR FROM ITS PURPOSE AND COMMON SENSE READING

In concluding that the term "administrative" in Category 2 must mean "federal administrative," the Fourth Circuit (as did the Third Circuit before it) erroneously applied the doctrine of *noscitur a sociis* — that a statutory "phrase 'gathers meaning from the words around it.'" *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). Looking at the three examples in Category 2, the Fourth Circuit reasoned that "administrative" must mean "federal administrative" because the other two examples, "congressional" and "Government Accounting Office," clearly were federal sources. *Wilson*, 528 F.3d at 302-03.

Respectfully, this approach misses the forest for the trees. Although it is true that a "word may be known by the company it keeps," this Court has also admonished that the doctrine of *noscitur a sociis* is "not an invariable rule, for the word may have a character of its own not to be submerged by its association." *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923). Moreover, in applying this rule to Category 2, the court of appeals also should have taken into account what Congress was trying to accomplish with *the entirety* of the types of "public disclosures" set forth in Section 3730(e)(4). *See Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990) ("Thus, the phrase 'any note' should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts.").

It is, in fact, the broader understanding of Category 2 adopted by the Eighth, Ninth, and Eleventh Circuits that "accords with the broad purposes of the legislation." *Russell Motor Car Co.*, 261 U.S. at 521.

In this case, the Fourth Circuit's narrow focus on the purported "federal" nature of the three examples in Category 2 completely ignores the thrust of all of the categories of "public disclosures" in Section 3730(e)(4)(A). Although the Fourth Circuit acknowledged that neither Category 1 nor Category 3 was limited to "federal" sources, the court's analysis gave short shrift to the expansiveness of those two categories.

Lower courts have almost universally interpreted Category 1 and Category 3 to be quite broad in their application. The circuit courts are in agreement that Category 1 includes both state and federal sources. *See, e.g.*, *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 330, 333 (3d Cir. 2005); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1341, 1350 (4th Cir. 1994); *United States ex rel. Reagan v. East Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 174 (5th Cir. 2004); *United States ex rel. Gilligan v. Medtronic, Inc.*, 403 F.3d 386, 390 (6th Cir. 2005); *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1161 n.6 (10th Cir. 1999). Indeed, even though the text of Category 1 states that it applies only to "criminal, civil or administrative *hearings*," the lower courts have properly and necessarily interpreted this to cover not only actual *hearings* but all proceedings or other aspects of a court case, whether state or federal. *See, e.g.*, *A-1 Ambulance Serv., Inc. v. State of Cal.*, 202 F.3d 1238, 1243-44 (9th Cir. 2000); *Springfield Terminal*, 14 F.3d at 652. The Third Circuit, which along with the Fourth Circuit has read Category 2 to be limited to federal sources, has gone so far as to interpret the term "hearing" in Category 1 to encompass discovery materials exchanged by private parties to a litigation in state or federal court, even

when those materials are not filed with the court and are, thus, not part of the public court record. *See Stinson*, 944 F.2d at 1158-60.

Similarly, the term "news media" in Category 3 has been applied broadly. The lower courts have defined "news media" to mean any published information disseminated to the public in a "periodic manner." *E.g.*, *United States ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.*, 186 F. Supp. 2d 458, 463 (S.D.N.Y.), *aff'd*, 53 F. Appx. 153 (2d Cir. 2002). In applying this definition, courts have had little trouble concluding that "news media" encompasses not only major national daily newspapers, such as the *New York Times* and the *Wall Street Journal*, but also regional newspapers, including the *Lansing State Journal*, the *Syracuse Herald*, and even unspecified "news media" in Nassau and Suffolk Counties (New York). *See, e.g.*, *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476 (2d Cir. 1995); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 14 (2d Cir. 1990); *United States ex rel. Dingle v. Bioport Corp.*, 270 F. Supp. 2d 968, 977 (W.D. Mich. 2003). Courts also have interpreted this category to include a broad array of news outlets besides traditional newspapers. *See, e.g., United States ex rel. Radcliffe v. Purdue Pharma LP*, 582 F. Supp. 2d 766 (W.D. Va. 2008) (holding that a pharmaceutical product's package insert qualified as a news media "public disclosure").

But courts have gone further. They have also construed "news media" to encompass publications with a limited circulation, such as scientific, scholarly, or technical publications. For example, in *Alcohol Foundation*, the district court *agreed with the Government* that the relator's allegations had been publicly disclosed in scientific publications that the relator claimed were "too technical for the average member of the public to understand" and were distributed to a small, professionally specialized reader base. 186 F. Supp. 2d at 463. In rejecting the relator's narrow

reading of the term "news media," the court noted that a similarly "cramped" interpretation of "hearing" had been rejected based on a plain reading of the public disclosure bar and reasoned that

> [n]o principle of statutory construction or public policy would compel a cramped reading of the term "news media" or the imposition of a judicially created limit on "news media" to encompass only the newspaper context.

Id. (citing *A-1 Ambulance*, 202 F.3d at 1244).

In *Dunleavy*, the Third Circuit (much like the Fourth Circuit in this case) found it "hard to believe that the drafters of [Category 2] intended the word 'administrative' to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character." 123 F.3d at 745. But the force to this observation falls away when one considers the placement of Category 2 — sandwiched as *it* is between Category 1 and Category 3, neither of which is limited to "federal" sources. Given the generally broad application of Categories 1 and 3, it simply defies logic and common sense to impose a reading of Category 2 that is so dramatically different from these other two.

B. ELIMINATING STATE SOURCES FRUSTRATES ONE OF THE PURPOSES OF THE PUBLIC DISCLOSURE BAR

Although the Fourth Circuit claimed that limiting Category 2 to federal sources was faithful to the intent of Congress, *Wilson*, 528 F.3d at 302-07, this claim does not withstand scrutiny.

The main thrust of the Fourth Circuit's reasoning for limiting Category 2 to federal sources was that "[i]nformation about federal investigations and audits is easily available to the members of the Department of Justice charged with enforcing the FCA" and because "the federal

government is unlikely to learn about state and local investigations." *Wilson*, 528 F.3d at 306. Thus, the court reasoned, "a large number of fraudulent claims against the government would go unremedied without the financial incentives offered by the *qui tam* provisions of the FCA." *Id.* Even assuming that such concerns are factually grounded, they address, at best, only half of what Congress sought to remedy in 1986 when it forged the public disclosure bar. Indeed, although the Fourth Circuit's analysis focused on avoiding overly strict application of the public disclosure bar whereby even original sources can be barred from bringing suit (in other words, overturning *Dean*), that singular focus fails to account for Congress's other goal — to avoid a return to *Marcus* by also preventing "potential . . . parasitic lawsuits by those who learn of the fraud through public channels." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 319 (2d Cir. 1992). *See also* S. Rep. No. 99-345 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5269 (Congress was seeking "the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity.").

Moreover, there is no explicit or implicit requirement in Section 3730(e)(4)(A) that the disclosure actually be known or transmitted — or even readily available — to the Federal Government for it to qualify as a "public disclosure." Certainly, as a practical matter, there is no reason to think that federal officials are conducting routine electronic searches for news media accounts exposing potential fraud on the federal fisc. Nevertheless, for purposes of Category 3, a short article describing a scheme to defraud the Government appearing on page 5 of the "Metro" section of the *Topeka Capital-Journal* is just as much a "public disclosure" as a full-fledged exposé of a scheme to defraud the Government splashed across the front page of the *Washington Post*. Ready access to the "public disclosure" by federal officials in Washington or elsewhere is just not part of the test created by Congress.

C. IT IS ENTIRELY APPROPRIATE FOR STATE SOURCES TO QUALIFY AS "PUBLIC DISCLOSURES"

There is no injustice or unfairness in allowing state-originated materials to qualify as "public disclosures." State-originated materials are just as "public" and just as "disclosed" as federal reports, hearings, audits, or investigations. Regardless of the fact that the allegations in a state report have become "public," the Fourth Circuit's *per se* ban against state-generated "public disclosures" would allow wholly parasitic *qui tam* suits to go forward.

In contrast, the Eleventh Circuit in *Battle* invoked the public disclosure bar under similar facts, thereby preventing parasitic claims from going forward. The Eleventh Circuit confronted a case in which the *qui tam* relator, a former university employee, filed an FCA suit against individual university administrators for alleged fraudulent activities in connection with the Federal Work Study Program. 468 F.3d at 758. According to the Eleventh Circuit, the relator's FCA allegations relied "chiefly on information that was publicly disclosed" in audit reports issued by the Georgia Department of Audits. *Id.* at 762. These state audits "revealed serious noncompliance with federal regulations and risk factors for fraud." *Id.* at 759. In 2002, the university reached a $2.17 million settlement with the U.S. Department of Education "to settle questioned costs identified by the state auditors in audits from 1997-2000 and in lieu of further file review." *Id.*

In the district court, the relator "referred Defendants to the audits performed by the State of Georgia Department of Audits and Accounts" and sought "all damages allowed under the False Claims Act for these violations." *Id* at 762. This blatant attempt by the relator to obtain a share of the Government's damages by simply regurgitating the findings of an official investigation sounds eerily familiar to the scenario in *Marcus*, where the *qui tam* relator simply cut and pasted the allegations from a criminal indictment into his

FCA complaint and demanded half of any subsequent civil judgment. *See Marcus*, 317 U.S. at 545. Yet, under the Fourth Circuit's *per se* rule, a relator not an original source could use these state audit reports to bring a *qui tam* case because the public disclosure bar would not be triggered. The Eleventh Circuit, on the other hand, had no difficulty concluding in *Battle* that the state report satisfied the public disclosure bar in Section 3730(e)(4)(A) and, thus, affirmed the dismissal of the relator's FCA claims. 468 F.3d at 763.

D. INTERPRETING THE PUBLIC DISCLOSURE BAR TO INCLUDE STATE SOURCES HAS NO EFFECT ON ENFORCEMENT OF THE FCA, NOR DOES IT DISCOURAGE TRUE WHISTLEBLOWERS FROM FILING FCA SUITS

Allowing state reports, hearings, audits, and investigations to qualify as "public disclosures" has no effect whatsoever on the *Government*'s ability to pursue FCA cases. Actions under the FCA may be initiated by the Attorney General or by a *qui tam* relator. *See* 31 U.S.C. §§ 3730(a) & (b). In addition, the Government may intervene in an action initially brought by a relator, thereby taking over the suit. *Id.* § 3730(b)(4)(A). As this Court has noted, the jurisdictional nature of the public disclosure bar has no impact on the ability of the United States to pursue an FCA action, whether the Attorney General initially brought the case or whether the Government chooses to intervene in a case filed by a *qui tam* relator. *See Rockwell*, 127 S. Ct. at 1411.[5]

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[5] It also should be noted that more than 95% of the recoveries in FCA cases arise in cases in which the Department of Justice either intervenes in a *qui tam* case or initiates a case on its own. *See, e.g.*, U.S. Gov't Accountability Office, GAO-06-320R, *Information on False Claims Act Litigation*, at 35 (2006), *available at*

Likewise, allowing state reports, hearings, audits, and investigations to qualify as "public disclosures" should have no effect on true whistleblowers. Indeed, the determination that a *qui tam* relator's claims are based on a "public disclosure" is only the first part of the public disclosure analysis. Under the "original source" exception, even a *qui tam* suit based on a "public disclosure" can go forward if the *qui tam* relator is a true whistleblower and "has direct and independent knowledge" of the alleged fraud. 31 U.S.C. § 3730(e)(4).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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[Footnote continued from previous page]

http://www.gao.gov/new.items/d06320r.pdf (analyzing FCA case data from the Department of Justice for Fiscal Years 1987-2005).